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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

UNITED STATES OF AMERICA, - - Respondent,

versus

CHARLES WAYNE SHELTON, - - - Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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96 pp
foldouts

QUESTIONS PRESENTED

The jury which convicted the Petitioner included the sister-in-law of a policeman who, during voir dire, knowingly failed to respond affirmatively to a direct inquiry as to whether she was related to a law enforcement officer. She failed to respond, despite her clear understanding of the question, simply because she thought the fact of such familial relationship was "not important." The Court of Appeals concluded that this juror had been wrong to decide for herself what information was important, but nevertheless upheld the denial by the District Court of a new trial because bias could not be implied from her "honest mistake." The questions thus presented are:

(1) Whether bias, sufficient to deprive a defendant in a federal criminal case of his Constitutional right to trial by a fair and impartial jury, may be implied from the deliberate failure of a juror to honestly answer a material question on voir dire; and

(2) Whether this Court should sanction a rule of law by which a potential juror may knowingly and intentionally fail to honestly answer a material question on voir dire, and thereby deprive a defendant in a federal criminal case of the accurate information essential to the effective exercise of challenges for cause and peremptory challenges, simply because the prospective juror determines that the subject matter of the inquiry is not important to him or her.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below included not only the Petitioner CHARLES WAYNE SHELTON and the Respondent UNITED STATES OF AMERICA but also CLIFFORD HOWARD, who, together with the Petitioner Shelton, was convicted in the United States District Court for the Eastern District of Kentucky of conspiracy and mail and wire fraud and whose appeal therefrom was consolidated with that of Shelton. The United States Court of Appeals for the Sixth Circuit reversed and remanded the conviction of Clifford Howard, but has subsequently granted a Petition for Rehearing En Banc as to Clifford Howard only.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

No. 84-

UNITED STATES OF AMERICA, - - - *Respondent,*

v.

CHARLES WAYNE SHELTON, - - - *Petitioner.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner prays that a writ of certiorari shall issue to review the Opinion and Order of the United States Court of Appeals for the Sixth Circuit entered on January 11, 1985.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit for which review is being hereby sought appears as *United States* v. *Howard* in 752 F. 2d 220 and is set forth in its entirety as Appendix A to this Petition.

STATEMENT OF JURISDICTIONAL GROUNDS

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit for which review is being hereby sought were entered on January 11, 1985.

The Petition for Rehearing by Charles Wayne Shelton was denied by Order entered on March 20, 1985, and the aforementioned Order originally entered on January 11, 1985 issued as a mandate on April 3, 1985. 28 *U.S.C.* § 1254(1) is believed to confer jurisdiction on this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit. The Petition is being submitted for filing within sixty (60) days from the date of denial of rehearing in accordance with Rule 20.1 and 20.4 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

Amendment VI of the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Emphasis added).

Rule 24 of the Federal Rules of Criminal Procedure provides:

> (a) Examination. The court may permit the defendant or his attorney and the attorney for the

government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror

who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

STATEMENT OF THE CASE

The Petitioner, Charles Wayne Shelton, was convicted in the United States District Court for the Eastern District of Kentucky of one count of conspiracy, 18 U.S.C. § 371, two counts of mail fraud, 18 U.S.C. § 1341, and one count of wire fraud, 18 U.S.C. § 1343. The Petitioner was alleged to have conspired with his sister, Harriet Joyce Howard, and her husband, Clifford Howard, to burn their residence in Cannonsburg, Kentucky, on April 10, 1981, and to have thereafter aided and abetted the Howards in the presentation of a fraudulent insurance claim.[1]

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[1]Harriet Joyce Howard was designated in the indictment as a co-conspirator, but was not formally charged. Her husband, Clifford Howard, was convicted together with the Petitioner Charles Wayne Shelton on the same four counts. A majority of the panel of the United States Court of Appeals for the Sixth Circuit which heard their consolidated appeals concluded that the conviction of Howard should be reversed. *United States* v. *Howard*, 752 F. 2d 220 (6th Cir. 1985). However, the Sixth Circuit has granted a

(Footnote continued on following page)

The Jury which returned the guilty verdict against the Petitioner and his co-defendant on March 4, 1983, after five days of trial and nearly ten hours of continuous deliberations, included one Sandra Rae Huffman, who, unbeknownst to the Petitioner or his counsel, is the sister-in-law of James Setters, a member of the Portsmouth, Ohio, Police Department.

Juror Huffman had had more than adequate notice and opportunity to disclose this familial relationship during voir dire but had knowingly and intentionally failed to do so. During his prefatory remarks, the trial judge had discussed the necessity ". . . to make every effort to be sure that the case is tried by a fair and impartial jury who will decide the case on the evidence they hear . . ." (Appendix G, p. 68). He advised the panel that the attorneys would be permitted to ask additional questions ". . . solely directed to determining whether anyone knows anything about the case or *is related to somebody* or knows somebody that would disqualify them from being a juror in this case." (Appendix G, p. 68).

The attorney for the United States thereafter made a general inquiry into the possible prior involvement of prospective jurors with law enforcement agencies. (Appendix G, p. 69). Counsel for the Co-defendant Clifford Howard, further explored this area, and asked

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(Footnote continued from preceding page)

petition by the United States for rehearing *en banc* and supplemental oral arguments are scheduled for June 14, 1985.

The Petitioner was charged and convicted under 18 U.S.C. § 2 as an aider and abettor on the three substantive counts of alleged mail and wire fraud.

whether any of the prospective jurors would ascribe more weight to the testimony of a police officer than to other witnesses. (Appendix G, p. 70). Most significantly, however, counsel for the Petitioner Shelton, after noting that two prospective jurors had responded affirmatively to earlier questions about associations with law enforcement agencies, then posed this question:

> "Let me expand that question just a little bit. Do any of you have any *relatives* or close personal friends — not just an acquaintance — but a close personal friend who happens to be a law enforcement officer?" (Appendix G, p. 71).

At least six persons responded affirmatively to this inquiry and were subjected to additional questioning. (Appendix G, pp. 72-73). However, Juror Huffman made no response whatsoever to any of the inquiries concerning possible relationships with law enforcement agencies or officers. In fact, Juror Huffman never voluntarily disclosed this familial relationship. However, when post-trial investigation revealed the fact that she did have a relative "who happens to be a law enforcement officer," the Petitioner asserted such circumstances as one of the grounds for a motion for a new trial.

A hearing was conducted before Magistrate Joseph M. Hood on April 29, 1983. During this hearing, Ms. Huffman confirmed that she recalled being asked questions by the Assistant United States Attorney and counsel for Clifford Howard about such relationships.

(Appendix H, pp. 78-80). More importantly, she specifically recalled being asked the question by counsel for the Petitioner Shelton as to whether any of the prospective jurors had a "relative who happens to be a law enforcement officer." (Appendix H, pp. 81, 85). She confirmed that she had not responded in any manner to this question, even though she had then considered her sister's husband to be a "relative," and even though she was aware that other prospective jurors were responding affirmatively to this inquiry. (Appendix H, pp. 81-82). She likewise confirmed that she knew at the time of the voir dire examination that her brother-in-law was a "law enforcement officer." (Appendix H, pp. 81-82, 85-86).

Her explanation of why she did not respond to the material question on voir dire clearly reveals that her inaction was deliberate, and not the result of any mistake or misunderstanding in regard to the nature of the inquiry. Ms. Huffman obviously chose not to answer the question on voir dire because she determined that the fact that her sister's husband was a police officer was "not important." She stated:

> "Well, they were asking, in other words, if it would have any effect if I was chosen to sit on the jury, would it make a difference in what I decided. It wouldn't have any effect whatsoever, and he was in the state of Ohio, and I just—this was my first time being called to jury service, and I just didn't realize that it would be important, you know, that I didn't mention his name.
>
> * * *

"Well, I just didn't—I just didn't think, myself, that it was that important to me. I guess I may have been wrong. It may have been important to someone else, but I knew that it wouldn't effect me in any way. And like I said, it was my first time being called back to jury service, and I just didn't realize—I just didn't stand up and say anything.

* * *

"Well, at the time I just didn't realize the importance of the question. I should have answered I guess, and told them about Jim.

* * *

"But I didn't realize that it was really that important.

* * *

"That is right, I didn't [think the fact was important]. It had no bearing—it wouldn't effect (sic) me in any way. When everyone began to stand up and tell their reasons why, and then they would say, 'well if you were chosen to be a juror would that make any difference whatsoever to you?' and, of course, everyone was saying, 'No.' And, I knew that there was no—I had nothing to hide by not telling it. There was no reason why I shouldn't have told it, but I just didn't. It was just an honest mistake on my part. I will know in the future; I will say something." (Appendix H, pp. 81-82, 86, 87, 87-88).

In his Report and Recommendation issued on May 20, 1983 (Appendix B), Magistrate Hood concluded that the bias of Juror Huffman should be presumed

from her deliberate concealment of the information concerning her relationship to James Setters and that the Petitioner was thus entitled to a new trial. However, Judge William O. Bertelsman, despite his not having had an opportunity to observe the demeanor of Ms. Huffman or to personally listen to her testimony, nevertheless concluded that bias should not be presumed. He somehow found that she had not concealed information and that her failure to respond to the questions on voir dire was an "honest mistake." (Appendix C, pp. 56-57). The Petitioner appealed from the Opinion and Order denying a new trial on these grounds entered on June 9, 1983 (Appendix C) and the Judgment entered on July 20, 1983. (Appendix D). The United States Court of Appeals for the Sixth Circuit, in an Opinion rendered on January 11, 1985, *United States* v. *Howard,* 752 F. 2d 220 (6th Cir. 1985), affirmed the decision of the District Court. (Appendix A). In doing so, the Court of Appeals found no error in the finding that the failure of Juror Huffman to respond to the material inquiry was an "honest mistake," and concluded that the *prima facie* case of deliberate concealment had thus been rebutted so that bias should not be implied. The Petitioner seeks a writ of certiorari to review this decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Under the Particular Circumstance of This Case, Bias Should be Implied From the Deliberate Failure of a Juror to Disclose Her Familial Relationship to a Police Officer.

The particular circumstances of this case warrant a re-affirmation and application of the doctrine of "implied bias" because of the deliberate failure of juror Sandra Rae Huffman to disclose her familial relationship to a police officer.

As Justice O'Connor noted in her concurring opinion in *Smith* v. *Phillips,* 455 U. S. 209, 222 (1982), "[I]n certain instances a hearing may be inadequate for uncovering a juror's biases." This is just such a case. The difficulty in determining whether juror Huffman was actually biased stems partly from the fact that she herself may have been unaware of any bias. Her explanation of her failure to respond to the question on voir dire was simply that she did not consider the matter of her relationship to a police officer to be important.

An analysis of whether bias should be attributed to Ms. Huffman because of her failure to accurately respond to this material inquiry on voir dire should not be permitted to begin and end with her simple characterization of her action as an "honest mistake." The Petitioner respectfully submits that the guarantee of trial by a fair and impartial jury embodied in the Sixth Amendment requires, at least, a thorough consideration of: what the precise nature of her improper conduct was; what the reason or motivation for her

improper conduct was; and what effect her improper conduct had on the rights of the Petitioner.

No presumption of correctness, such as the one required by 28 U.S.C. § 2254(d) to be applied to a finding of the state court in federal habeas corpus proceedings,[2] need be applied to the lower court "finding" herein that the failure of Ms. Huffman to accurately answer the material inquiry on voir dire was an "honest mistake". Such "finding" is clearly erroneous, for her improper conduct was neither "honest" nor a "mistake". Even a cursory review of her hearing testimony reveals that juror Huffman was not mistaken either in her understanding of the question or in her understanding of the true facts which should have been disclosed in response to the question.[3] She heard and comprehended the question, and realized at the time the question was posed that her brother-in-law, with whom she regularly socializes, was both a "relative" and a "law enforcement officer". Moreover, she saw and heard five or six other members of the venire respond to this question by describing the connections of family members with various law enforcement agencies. Juror Huffman then determined for herself that disclosure of the truth as to her relationship to a police officer was simply "not important". Her failure to disclose the truth thus was not the result of a

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[2]Cf., *Smith* v. *Phillips*, 455 U. S. 209, 218 (1982).

[3]Her situation is thus distinguishable from the one presented in *McDonough Power Equipment, Inc.* v. *Greenwood*, ___ U. S. ___, 104 S. Ct. 845 (1984), in which the juror truly was mistaken as to the nature and scope of a particular question on voir dire.

mistake, but rather, represented a conscious determination on her part that the truth was not important.

Her answer to the material question on voir dire, albeit by silence, was "No, I do not have a relative who happens to be a law enforcement officer." The question was clear. Her answer was clear. Her answer was also clearly false. Regardless of whether she was possessed of any malevolent intent, juror Huffman knowingly conveyed false information in response to a material question. Her answer was, therefore, not "honest"; it was "dishonest" both in terms of her knowledge of the true facts and in terms of the information which was effectively conveyed to the Petitioner and his counsel.

There is no readily discernible method for establishing any hidden reason or motivation on the part of the juror Huffman for her improper conduct except through her own after-the-fact testimony, and the absence of such alternative methods provides graphic evidence of the inadequacy of a blanket rule which would foreclose application of the doctrine of implied bias and would require proof of actual bias in every case in order to successfully assert a claim of deprivation of the Sixth Amendment right to trial by a fair and impartial jury. What reasonable person, having knowingly provided false information on voir dire, would thereafter admit that he or she had done so because of animus for the accused or because of other improper reasons, and thereby subject himself or herself to severe legal sanctions?

The explanation which juror Huffman did provide is perhaps indicative of an inherent bias. The determination by the relative of a police officer that such fact is "not important" to consideration of her qualifications as a juror in a criminal trial raises serious questions as to her capacity to properly evaluate testimony and resolve issues of credibility without subjectively assigning greater weight to evidence presented by or on behalf of law enforcement officers. The reasonable possibility that a juror with the thought processes which Ms. Huffman herself described might subconsciously resolve the significant credibility issues present in this case in favor of those witnesses whom she associates mentally with her police officer brother-in-law, for whom she obviously has considerable respect and affection, warrants an implication of bias on her part.

The deliberate determination by juror Huffman not to disclose her familial relationship to a police officer had the effect of depriving the Petitioner of the opportunity to have her replaced by a juror of more likely impartiality, who, in resolving the significant issues of credibility presented in this case, might have assigned greater weight to the evidence presented by the Petitioner. This effect obtains regardless of any conscious sinister motivation on the part of Ms. Huffman. The Petitioner was thus prejudiced and this prejudicial effect militates strongly in favor of appli-

cation of the implied bias doctrine in this case.[4] Conviction by a jury including a member thus presumed to be biased against him clearly constituted a violation of the Sixth Amendment right of the Petitioner to trial by a fair and impartial jury.

This Court Should Exercise Its Supervisory Power to Reject a Legal Standard by Which a Prospective Juror in a Federal Criminal Case May Knowingly and Intentionally Fail to Honestly Answer a Material Question on Voir Dire, and Thereby Deprive the Defendant of His Right to Effectively Exercise Challenges, Because the Juror May Decide That the Object of the Question Is "Not Important."

The Court of Appeals did not address the non-Constitutional issue arising from the impact of the intentional non-disclosure of material information by juror Huffman upon the ability of the Petitioner to effectively exercise his challenges for cause and peremptory challenges. The effect of the decision by the Court of Appeals is to establish a legal standard under which a

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[4]The instant situation thus differs from the one presented in *Smith* v. *Phillips, supra,* in which juror John Dana Smith during voir dire had candidly explained his past association with police work and had unequivocally expressed his intention to pursue a career in law enforcement, but was nevertheless selected as a member of the jury. The perception of this juror, with his clear affinity for law enforcement agencies and their work obtained by the accused and counsel during voir dire, would not have been dramatically altered by revelation of the fact that juror Smith had applied for a job as an investigator in the office of the district attorney during the trial. However, the Petitioner herein would have had a perception of juror Huffman substantially different from the one formed on the basis of her false answers on voir dire had he been honestly advised of her familial relationship to a law enforcement officer.

potential juror may, with impugnity, intentionally fail to honestly answer a material question on voir dire, and thereby deprive a defendant in a criminal case of accurate information essential to the effective exercise of challenges for cause and peremptory challenges, simply because the juror determines that the subject matter of the inquiry is "not important" to him or her. Such a standard would serve to render virtually meaningless the process of voir dire as a foundation for the exercise of fundamental juror challenge rights. Moreover, the establishment of such a legal standard would result in the approval of a process in which prospective jurors may totally disregard material questions on voir dire, or answer them honestly, dishonestly, or in any manner they might choose, without recourse, except in those rare situations in which actual ill-will or bias can be established through the testimony of the jurors themselves.

This Court has long acknowledged its authority to reverse a criminal conviction because of juror-related improprieties, even though such improprieties may not be of Constitutional magnitude, " '[i]n the exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts.' " *Marshall* v. *United States,* 360 U. S. 310, 313 (1959), as cited in *Murphy* v. *Florida,* 421 U. S. 794, 797 (1975). This supervisory power to formulate and apply proper standards for enforcement of the criminal law in federal courts would not appear to have been abridged by the recent decision of this Court in *McDonough Power Equipment, Inc.* v.

Greenwood, — U. S. —, 104 S. Ct. 845 (1984). The *McDonough Power Equipment* decision did not specifically address the concerns of criminal cases, in which the interests of the accused in regard to jury selection are markedly different than those of parties in civil litigation. The *McDonough Power Equipment* decision did not purport to disturb the proposition enunciated in *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965): "The denial or impairment of the right [of peremptory challenges in criminal cases] is reversible error without a showing of prejudice . . .' [F]or it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.' "

There can be no greater impairment of the right of peremptory challenges than by rendering meaningless the process of voir dire in which information essential to the intelligent exercise of such challenges must be developed. If a prospective juror in a criminal case is permitted to provide false information to the accused, and the accused is thereby misled, his right to exercise a peremptory challenge as to such juror has been impaired. His capacity to make an intelligent choice has been destroyed. The right of peremptory challenge thus loses its essential value and efficacy.

Even if the juror unintentionally provided false information or had no bad faith which caused her to provide the false information, those circumstances would not in any way mitigate the wrong done to the accused which arises out of the falsity of the information regardless of whether the juror intended to mislead the

accused. Willful falsehood may intensify the wrong done, but the converse is not necessarily true. An accused, misled by false information received during voir dire, is no less deprived of his right to effectively exercise his challenges by the fact that the juror who provided the false information may not have done so with an evil heart.

Juror Huffman knowingly and intentionally failed to honestly answer the material question on voir dire concerning her familial relationship to a law enforcement officer and the Petitioner Shelton was thereby misled. He was thus prevented from making the specific inquiries of Ms. Huffman which would have been appropriate because of the particular police force of which her brother-in-law is a member.[5] Therefore, his ability to perhaps challenge Ms. Huffman for cause was severely impaired. The false information knowingly provided by juror Huffman clearly destroyed his right to effectively exercise his peremptory challenge rights as to her.

The decision of the Court of Appeals, if permitted to stand, would establish a standard by which a juror, having decided that the subject matter of a material

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[5]The sequence of events which culminated in the conviction of Charles Wayne Shelton really began with his interrogation in 1981 by a detective with this same Portsmouth, Ohio, Police Department. This detective thereafter testified against Shelton in a 1982 trial in which Shelton was acquitted on several Dyer Act charges. The key witness in both the Dyer Act case and the instant prosecution was a government informant named Johnny Howard, who, during the instant prosecution, was believed to have been residing in the Portsmouth, Ohio, area, at least partly under the supervision of the Portsmouth Police Department.

inquiry on voir dire is "not important", may knowingly provide false information in response to the inquiry, regardless of the resultant damage to the right of the accused to effectively exercise his challenges, provided the juror does not admit or overtly exhibit blatant bias or an evil heart. This Court should exercise its supervisory power over the formulation and application of proper standards for enforcement of criminal law in the federal courts to insure that the aforedescribed standard does not become the prevailing law either within the Sixth Circuit or elsewhere.

CONCLUSION

The Petition therefore prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A—Opinion of the United States Court of Appeals for the Sixth Circuit (January 11, 1985)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 83-5434, 83-5436, 83-5533 and 83-5534

UNITED STATES OF AMERICA - - *Plaintiff-Appellee,*

v.

CLIFFORD HOWARD and
CHARLES WAYNE SHELTON, - *Defendants-Appellants.*

Argued June 14, 1984.
Decided Jan. 11, 1985.

Before ENGEL and MARTIN, Circuit Judges, and SWYGERT, Senior Circuit Judge.*

SWYGERT, Senior Circuit Judge.

Defendants Clifford Howard ("Clifford")[1] and Charles Wayne Shelton ("Charles") appeal from their convictions in the United States District Court for the District of Kentucky for conspiracy and mail and wire fraud. The indictment alleged that defendants conspired with Harriet Shelton Howard ("Harriet") (wife of defendant Clifford and sister of defendant Charles) and Johnny Howard ("Johnny") (unrelated to the other Howards) to defraud Grange

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*The Honorable Luther M. Swygert, Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

[1]Because of the reoccurrence of last names, we will refer to the alleged conspirators and members of their families by their first names.

Mutual Casualty Company by burning the residence of Clifford and Harriet. The indictment alleged that the residence was burned by Charles with the assistance of Johnny. The indictment further charges that the scheme continued after the fire with substantive acts of mail and wire fraud in an attempt to perfect the claim for insurance proceeds on the fire loss.

The case was referred by the district court to a magistrate for consideration of various pretrial matters. After a hearing the magistrate found that the tape recording of conversations between Charles and Johnny did not implicate Charles' sixth amendment rights and that the tapes met the authenticity and accuracy requirements set forth in *United States* v. *Starks,* 515 F. 2d 112, 121 n. 11 (3rd Cir. 1975). The magistrate recommended that the defendants' motion to suppress the tapes be denied, Magistrate's Report and Recommendation filed October 15, 1982, and the district court adopted this recommendation, Order filed December 23, 1982.

The case was tried to a jury. After ten hours of deliberation, the jury found defendants guilty on all counts. Defendants thereafter filed a motion for a new trial on the ground that one juror deliberately concealed material information on voir dire. Defendants also moved for a new trial on the ground that two other jurors were exposed to extraneous prejudicial information. The motion was referred to the magistrate who recommended that a new trial be granted on the basis that a juror deliberately concealed information on voir dire. The magistrate recommended that the motion for a new trial be denied in all other respects. Magistrate's Report and Recommendation filed May 20, 1983. After additional testimony in the district court, the court concluded that a new trial was not warranted on any grounds. Opinion and Order filed June 9, 1983; Findings of Fact, Conclusions of Law, and Order filed

July 20, 1983. The defendants were sentenced to ten years each with five years probation following their release from prison.

Defendants argue on appeal that: (1) the district court erred in denying their motion for a new trial on the ground that a juror deliberately concealed information on voir dire; (2) the district court abused its discretion by denying their motion for a new trial on the ground that another juror was shown to lack impartiality; (3) the court erred in permitting the United States to introduce tape recordings of conversations between Charles and Johnny which were held in violation of Charles' sixth amendment right to counsel; (4) the court erred in admitting evidence illegally seized from the Howards' residence; and (5) the court erred in admitting out-of-court statements of Charles and Johnny against defendant Clifford.

I

Sandra Rae Huffman was impaneled as an alternate juror but replaced a regular juror who was dismissed for illness. During voir dire, defense counsel asked whether any of the prospective jurors had "any relatives or close personal friends . . . who happen . . . to be a law enforcement officer?" Excerpted Transcript of Voir Dire on February 28, 1983 at 66. At least six persons responded affirmatively and were subjected to additional questioning. *Id.* at 66-70. Huffman did not respond. At the posttrial hearing, Huffman admitted that her brother-in-law was an officer with the Portsmouth, Ohio Police Department at the time of the trial and that she considered him a relative. When asked why she did not respond to the question, Huffman stated:

> Well, they were asking, in other words, if it would have any effect if I was chosen to sit on the jury, would it

> make a difference in what I decided. It wouldn't have any effect whatsoever, and he was in the State of Ohio, and I just—this was my first time being called to jury service, and I just didn't realize that it would be important, you know, that I didn't mention his name.

Transcript of Magistrate's Hearing on April 29, 1983 at 80. Huffman gave similar responses each time she was asked why she failed to respond to the question on voir dire. *See id.* at 82, 88.

Defendants argue that bias on the part of Huffman must be presumed as a matter of law under the rule set forth in *McCoy* v. *Goldston*, 652 F. 2d 654 (6th Cir. 1981). In *McCoy*, this court stressed the importance of preemptory challenges, *id.* at 657-58, and found that the right to the exercise of such challenges is prejudicially impaired by a prospective juror's deliberate concealment of information on voir dire, *id.* at 658. The court concluded that bias must be presumed and a new trial granted "when a juror deliberately concealed information or gave a purposefully incorrect answer." *Id.* at 659. *McCoy* set forth three factors to be considered in determining whether a juror has deliberately concealed information or purposefully given an incorrect answer:

> A. Whether the question asked sufficiently inquired into the subject matter to be disclosed by the juror.
>
> B. Whether the response of other jurors to the question asked would put a reasonable person on notice that an answer was required.
>
> C. Whether at any time during the trial the juror became aware of his false or misleading answer and failed to notify the district court.

Id. at 658-59 (footnotes omitted).

The government argues that *McCoy* has been limited if not overruled by Supreme Court decisions in *Smith* v. *Phillips,* 455 U. S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982), and *McDonough Power Equipment, Inc.* v, *Greenwood,* ___ U. S. ___, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984). *Cf. United States* v. *Pennell,* 737 F. 2d 521 at 533 n. 11 (6th Cir. 1984) (after *Phillips,* a "hearing at which the defendant bears the burden of proving actual bias . . . is adequate in most cases involving . . . juror misconduct"). In *Smith, supra,* the Court held that the due process clause does not require the district court in a habeas proceeding to presume bias on the part of a juror in a state criminal proceeding who had an application for employment pending in the state prosecutor's office. 455 U. S. at 214-18, 102 S. Ct. at 944-46. In *McDonough,* a plurality of the Court held that a new trial is warranted only where a party demonstrates "first . . . that a juror failed to answer honestly a material question on *voir dire,* and then further . . . that a correct response would have provided a valid basis for a challenge for cause." 104 S. Ct. at 850. Two Justices concurred in the judgment only and three Justices joined a concurring opinion which stated that bias may be presumed in some cases. *Id.* (Blackmun, J., with whom Stevens, O'Connor, JJ., join, concurring); *id.* (Brennan, J., with whom Marshall, J., joins, concurring in judgment).

[1] We need not decide whether these cases overrule *McCoy* v. *Goldston, supra,* because we find that even under *McCoy,* implied bias is not warranted in the instant case. Defendants have failed to prove that Huffman deliberately concealed information. *McCoy* involved a voir dire question almost identical to that involved in the instant case. The juror in *McCoy* gave no response to the question although her son was training to became a probation officer. The court found this evidence sufficient to establish a prima

facie case of deliberate concealment by the juror and to require a posttrial hearing at which the juror could be examined. 652 F. 2d at 659. The court did not find the evidence sufficient to require a new trial.

We do not doubt that the defendants in the instant case established a prima facia case of deliberate concealment by Huffman under the criteria established in *McCoy*. Thus, the court was required to hold a posttrial evidentiary hearing. The court held such a hearing. On the basis of the evidence adduced at the hearing, the court found that "Huffman's failure to respond was an honest mistake. Huffman failed to respond because she honestly believed that she did not have to answer the question." Opinion and Order filed June 9, 1983 at 6. We find no error in the district court finding.

Huffman testified that she did not intend to conceal information and did not know she was misleading the court. She explained that she concluded for herself that the question was intended to find out only whether her judgment would be affected by a relative's employment as a police officer. She then concluded that her brother-in-law's employment would not affect her judgment and therefore did not respond to the question. Huffman was wrong to decide for herself what information was important. Nevertheless, her testimony was sufficient to rebut the defendant's prima facie case of deliberate concealment. First, defendants failed to establish the third factor listed in *McCoy*. Huffman claimed that she did not realize before or during the trial that her failure to respond to the question was false or misleading. Second, Huffman's stated understanding of the question is credible given the entire course of the voir dire questioning. Prior to the question whether anyone had a close friend or relative who was a law enforcement officer, the government attorney asked the members of the venire whether anyone had prior contact

with the Kentucky State Police. Those persons who responded affirmatively were asked whether the contact left them with a particularly favorable or unfavorable impression or whether the contact would affect their judgment if they were chosen to sit on the jury. Transcript of Voir Dire on February 28, 1983 at 27-34. The prospective jurors were then asked by defense counsel whether anyone felt that the testimony of a law enforcement officer was inherently more believable or entitled to greater weight than the testimony of an ordinary citizen. *Id.* at 56. No one responded affirmatively to this question. Finally, those who responded affirmatively to the question whether anyone had a close friend or relative who was a law enforcement officer were subsequently asked only whether the relationship would influence their decision or cause them concern if they were chosen to sit on the jury. They all responded negatively to the second question and were permitted to continue as prospective jurors. *Id.* at 66-70. This evidence supports the district court's conclusion that "Huffman's failure to respond was an honest mistake." Opinion and Order filed July 9, 1983, at 6.

II

On voir dire, the prospective jurors were asked if they knew any members of the defendants' families, but no names were mentioned. Tamyra Black did not respond to the question and was selected as a juror. After trial, it was learned that Black and her family had previous contacts with the defendants and members of their families. Black attended high school with Sonja Howard, the daughter of Clifford. Black testified at the posttrial hearing that she became aware of her acquaintance with Clifford's daughter when Sonja testified at trial. Black claimed that she recognized Sonja from high school days but could recall no specific contact with Sonja and had no basis to form an

opinion about her. Transcript of Magistrate's Hearing on April 29, 1983 at 93-95. Sonja, on the other hand, testified that an incident occurred in high school which caused Black to feel ill-will towards Sonja. *Id.* at 29-30. Clifford's son, Franklin Elmo Howard, also attended high school with Black. Black testified that she did not know Franklin from high school. *Id.* at 96-97. Franklin testified, however, that he had an angry encounter with Black in high school as a result of a fight he had with Black's high school boyfriend. *Id.* at 22-27. Black also had a connection with the father of defendant Charles. Black's brother had negligently destroyed property belonging to the father for which Black's parents were required to pay damages. Black testified that her father mentioned at the beginning of the trial that he knew one of the defendants but that she did not realize that Charles' father owned the property destroyed by her brother until after the trial had ended. *Id.* at 98-102, 117. Finally, Black received an anonymous telephone call during the trial asking if she was a juror on the case. Transcript of District Court Hearing on July 5, 1983 at 33-35.

[2, 3] Defendants do not allege that Black deliberately concealed material information on voir dire. Thus, the *McCoy* rule of implied bias is inapplicable. Defendants were required to prove actual bias with respect to Black. *See McCoy* v. *Goldston, supra,* 652 F. 2d at 659. They must "demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise a presumption of partiality.'" *Murphy* v. *Florida,* 421 U. S. 794, 800, 95 S. Ct. 2031, 2036, 44 L. Ed. 2d 589 (1975). "[A] trial judge's finding of impartiality should be set aside only upon a showing that prejudice is manifest." *Haney* v. *Rose,* 642 F. 2d 1055, 1060 (6th Cir.), *cert. denied,* 452 U. S. 908,

101 S. Ct. 3036, 69 L. Ed. 2d 409 (1981);[2] *cf. United States* v. *Pennell, supra,* at 532-533 (adopting abuse of discretion standard of review of trial court's decision not to grant a mistrial for alleged unauthorized contact with jurors); *United States* v. *Sisk,* 629 F. 2d 1174, 1179 (6th Cir. 1980), *cert. denied,* 449 U. S. 1084, 101 S. Ct. 871, 66 L. Ed. 2d 809 (1981) ("Ordinarily a trial judge's estimate of jury prejudice is accorded 'the highest degree of respect.' "). The district court found Black's testimony credible and that she sat as an impartial juror. Findings of Fact, Conclusions of Law, and Order filed July 20, 1983. Defendants have offered no evidence to rebut the district court's credibility finding and have not made the very high showing of prejudice necessary for this court to overturn the district court's determination.

III

The indictment in the instant case charged that defendant Charles Shelton, with the assistance of unindicted coconspiratory Johnny Howard, deliberately set fire to the residence of Clifford and Harriet Howard, Thereafter, Johnny became a government informant in return for a grant of immunity in the instant case and an agreement that he would not be prosecuted for various other criminal offenses. The government also enrolled Johnny for a while in the federal witness protection program. As a part of Johnny's agreement with the government, Johnny arranged to meet with defendant Charles and to record their con-

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[2]Although *Murphy* v. *Florida, supra,* and *Haney* v. *Rose, supra,* dealt with habeas petitions alleging jury partiality in state proceedings, this circuit has applied the same standards in federal proceedings. *See United States* v. *Giacalone,* 588 F. 2d 1158, 1163 (6th Cir. 1978), *cert. denied,* 441 U. S. 944, 99 S. Ct. 2162, 60 L. Ed. 2d 1045 (1979).

versations. Johnny was instructed to discuss particular offenses with Charles in an attempt to gather incriminating statements.

[4] Defendants claim that these conversations violated Charles' sixth amendment right to the assistance of counsel. Defendants rely primarily on *United States* v. *Henry,* 447 U. S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). In *Henry,* the defendant was indicted for armed robbery and was confined in jail pending trial. Federal agents contacted in inmate confined in the same cellblock as the defendant and offered to pay the inmate for furnishing incriminating statements by the defendant. At trial, the inmate testified about the defendant's incriminating statements. The Supreme Court held that the government violated to defendant's sixth amendment right to counsel "[b]y intentionally creating a situation likely to induce [defendant] to make incriminating statements without the assistance of counsel. . . ." *Id.* at 274, 100 S. Ct. at 2189. The court found three factors important in determining that the government "deliberately elicited" incriminating statements from defendant: (1) the inmate was acting under instructions as a paid informant for the government; (2) the informant "was ostensibly no more than a fellow inmate of [defendant]"; and (3) the defendant was in custody and under indictment at the time he was engaged in conversation by the informant. *Id.* at 270, 100 S. Ct. at 2186. The Court noted that the defendant's incarceration, while a "relevant factor," does not imply a "custody requirement" for sixth amendment rights to attach. *Id.* at 273 & n. 11, 100 S. Ct. at 2188 & n. 11. Indictment or some formal filing of charges, however, is required before sixth amendment rights are triggered. *Id.* at 269-70, 272, 100 S. Ct. at 2186-2188; *see also Kirby* v. *Illinois,* 406 U. S. 682, 689, 92 S. Ct. 1877, 1882, 32 L. Ed. 2d 411 (1972) (sixth amendment right to counsel attaches "at or after initiation

of adversary judicial proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"). Thus, the Court explained in *Henry:* "It is quite a different matter when the Government uses undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed." 447 U. S. at 272, 100 S. Ct. at 2188. Preindictment claims are covered by the fourth and fifth amendments. *Id.; see also United States* v. *Muzychka,* 725 F. 2d 1061, 1069 (3rd Cir.), *cert. denied,* ___ U. S. ___, 104 S. Ct. 2390, 81 L. Ed. 2d 348 (1984) ("Until adversary judicial proceedings have commenced, coercive methods of eliciting information from a defendant are governed by *Miranda* and due process and self-incrimination analyses."). Defendants raise no fourth or fifth amendment claim before this court.

[5] All of the circuits including this one have held that the sixth amendment right to counsel does not attach until adversary judicial proceedings have commenced. *See, e.g., United States* v. *Muzychka, supra,* 725 F. 2d at 1968-69; *United States* v. *Franklin,* 704 F. 2d 1183, 1189 (10th Cir.), *cert. denied,* ___ U. S. ___, 104 S. Ct. 146, 78 L. Ed. 2d 137 (1983); *United States* v. *Hansen,* 701 F. 2d 1215, 1220 (7th Cir. 1983); *United States* v. *Brown,* 699 F. 2d 585, 589 (2d Cir. 1983); *United States* v. *Hamilton,* 689 F. 2d 1262, 1275 (6th Cir. 1982), *cert. denied,* 459 U. S. 1117, 103 S. Ct. 753, 74 L. Ed. 2d 971 (1983). Although there might be room in some cases to question when adversary judicial proceedings have commenced, *see, e.g., United States* v. *Muzychka, supra,* 725 F. 2d at 1068-69, we find no such question in this case. Charles was only a target of the government's investigation at the time of his conversations with the government informant; he was not under arrest and no indictment or other formal charges had been filed. Thus, his sixth amendment rights had not attached.

IV

The charred remains of the Howard residence were extensively investigated by both state police and the Howard's insurer. The investigators for both the police and the insurance company were looking for evidence of arson, albeit for different reasons, and the investigators cooperated with each other in the investigation. The police investigator spoke to Clifford Howard before entering the premises but obtained neither express consent nor a warrant to conduct his search. The insurance company investigator entered the premises pursuant to a clause in the insurance contract permitting fire investigations.

At trial, the government attempted to introduce the testimony of the police investigator regarding his investigation. Defendants objected to this testimony as the fruit of an unlawful search because the police had obtained neither consent nor a warrant before entering the property. The trial court sustained defendants' objection. Excerpted Transcript of Trial on March 1-4, 1983, vol. I at 35-37. The court, however, permitted the government to introduce the testimony of the insurance company investigator. *Id.* at 56-73. The defendants object to the admission of this testimony. Although a private citizen generally is not subject to the strictures of the fourth amendment, defendants argue that the search of the premises was conducted and directed by the police with the insurance company investigator acting merely as an agent of the government. If the private investigator was acting as "an 'instrument' or agent" of the government, then all evidence resulting from the search must be suppressed. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 487, 91 S. Ct. 2022, 2049, 29 L. Ed. 2d 564 (1971).

[6] We agree with defendants that a consent clause in an insurance contract does not insulate from the fourth

amendment a search by a private investigator who acts as an agent of the government to gather incriminating evidence for use in a criminal proceeding. First, the consent contemplated by an insured who agrees to a consent clause is consent to search for evidence relating to the insurer's liability. An insured does not contemplate consenting to a search of his home for any and all reasons. *Cf. Zap* v. *United States,* 328 U. S. 624, 629, 66 S. Ct. 1277, 1279, 90 L. Ed. 1477 (1946) (assuming that consent to search did not imply consent to sieze item). Moreover, because an insured may be or may feel compelled to agree to a consent provision to obtain the insurance policy, we are not convinced that this consent meets the criteria of voluntariness, *see Schneckloth* v. *Bustamonte,* 412 U. S. 218, 248, 93 S. Ct. 2041, 2058, 36 L. Ed. 2d 854 (1973) ("[T]he Fourt and Fourteenth Amendments require that [the state] demonstrate that the consent [to search] was in fact voluntarily given, and not the result of duress or coercion, express or implied.").

[7, 8] We find, however, that the insurance company investigator while cooperating with the police was not acting as an agent of the government. In *United States* v. *Walther,* 652 F. 2d 788, 792 (9th Cir. 1981), the Ninth Circuit found that "two of the critical factors in the 'instrument or agent' analysis are: (1) the government's knowledge or acquiescence, and (2) the intent of the party performing the search." In the instant case there is no question that the government had knowledge of, and even participated in the search. Nevertheless, where, as here, the intent of the private party conducting the search is entirely independent of the government's intent to collect evidence for use in a criminal prosecution, we hold that the private party is not an agent of the government. *See also United States* v. *Capra,* 501 F. 2d 267, 272 n. 4 (2d Cir. 1974), *cert. denied,* 420 U. S. 990, 95 S. Ct. 1424, 43 L. Ed. 2d 670 (1975) ("when

police are merely assisting a private party, who has authority to search and a legitimate need to do so, . . . courts are reluctant to exclude resulting evidence"); *cf. Stone* v. *Wingo,* 416 F. 2d 857, 860 (6th Cir. 1969) (actions of private party attributed to state where " 'parties act . . . together, in pursuance of some design or in accordance with some scheme' "); *Metheany* v. *United States,* 365 F. 2d 90, 94 (9th Cir. 1966) (evidence obtained by a trustee pursuant to a warrant from a bankruptcy court is admissible in a criminal proceeding where the trustee was "primarily motivated by his lawful duty to investigate the bankrupt's affairs and collect the assets of the estate, [not] by a desire to commit a wrongful act"). The insurance company investigator was rightfully on the property to determine the liability of the insurance company and his actions are not attributable to the government. Thus, the district court did not err in admitting his testimony.

V

We do find merit in defendant's final claim. We hold that the admission into evidence against Clifford of the tape recorded conversations between Charles and Johnny[3]

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[3]The relevant portions of the conversations are as follows:

Conversation between John Howard and Charles Shelton, dated May 9, 1981.

JH: Right. What, oh hell I was gonna say, whatscallit, wanted me to go do a damn burn a house.

CS: Who did?

JH: What's the guy's name. Stanley? That deputy sheriff?

CS: Yeah Ray Stanley. Tall slim boy?

JH: Yeah.

CS: Why have you been dealing with him?

JH: No I just met him. They just said I'd do anything for a dollar.

(Footnote continued on following page)

(Footnote continued from preceding page)

CS: Who'd, who'd you meet him through?

JH: Down as Holbrook's. What's his name?

CS: Don't do it. Don't fuckin do it.

JH: OK.

CS: Don't do it. What the mother-fuckers are probably trying to do, probably trying to set you up into something else.

JH: Yeah. Yeah. Wasn't gonna do it.

CS: See and Bill knows about these insurance houses.

JH: Insurance houses?

CS: He don't know that me and you have burned any, but he knows that I had the contact to do some of these houses.

JH: Oh. I don't know nothing about them houses.

CS: Well I know that. But that I'm saying is don't even go burn no fuckin house down.

JH: Shit I wouldn't burn nothin. I was just said, you know, if you know'd the guy.

CS: Yeah I know him.

JH: I know that last incident, my Goddamn it, we blowed our fuckin self up.

CS: So, don't even, don't even go fuckin do nothin.

JH: Right.

Conversation between John Howard and Charles Shelton, dated May 12, 1981.

JH: Did you find out anything about it, how's your sister make out?

CS: Oh, she's maintaining, you know, staying straight.

JH: Is she? She ever get a settlement?

CS: Not yet.

JH: Goddamn. Well she should.

CS: She if they get that fuckin settlement, see I've got 8 thousand dollars coming on that fuckin settlement.

JH: Supposedly.

(Footnote continued on following page)

(Footnote continued from preceding page)

CS: Well, 6 to 8. Man garan . . ., here's what he guaranteed me five. He guaranteed me. He said Goddamn said I'll give you five grand.

JH: For what?

CS: Nothing. Well, not exactly nothing. There was something else involved.

JH: Yeah, yeah. Better off (pause) I know.

CS: You, I don't know whether he's jacking his fuckin leg or what.

JH: I just wondered if she ever got a.

CS: No, but they ain't settled a fucking thing. They was supposed to come, (inaudible) . . . little bit closer.

JH: Yeah.

CS: They're supposed to come in there and dig every fuckin thing up. Hunting for dynamite.

JH: Dig it up?

CS: I said yeah, I said well Goddamn it tell 'em there ain't no fuckin dynamite involved. Cause I know they ain't.

JH: Shit you and me both know that. You and your 40 fuckin gallons of gas. 40. I couldn't believe you had that much gas.

CS: By God it burned down didn't it?

JH: It didn't burn, it blowed, mother fuck. You should never put 40 gallons in there.

CS: I told him I said hey, I said take my word for it and I'll give you a deposition they ain't no, ain't no fuckin dynamite involved. It's all gasoline. He said fuck you, I can't do that, Goddamn it. He said they want to come in here and look for it. He said I gotta let 'em come in here and look for it.*

JH: Yet but how come you used 40 fuckin gallons?

CS: I wanted to make sure that mother fucker came down. Have they ask you any more about fuckin Stanley?

JH: No.

CS: Burn that fuckin place or whatever it was?

JH: No they asked me to burn one.

(Footnote continued on following page)

violated Fed. R. Evid. 802 which prohibits the admission of hearsay in the federal courts except as provided by the Federal Rules of Evidence.[4]

(Footnote continued from preceding page)

CS: Yeah I knew that.

JH: I thought about it, cause the money was pretty good. . . . Like you told me, not to do nothing.

CS: Only thing I'm afraid of, I'm afraid the mother fuckers maybe trying to fuckin set you up.

JH: Yeah. I said no I was under investigation and that's the only thing that kept me out of it.

CS: Tell 'em if they want to wait a couple of fuckin months, ah, you'd be glad to do it.

JH: Me and you would do it. Right?

CS: (Laugh).

JH: Well the price is right.

CS: That will pend them. You know, hold them off.

JH: Yeah. I just told 'em I was under investigation and I didn't want to mess with them. I was just wondering if she got any damn money out of that damn. . . .

CS: No. I ain't got . . . .

JH: I hate to see her lose her damn place there.

CS: They can't lose nothing. The worst thing that could happen is the mother fuckers come in and close it all out and say hey it belongs to us.

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*When asked who "he" referred to, both Charles and Johnny responded that "he" referred to Clifford. *See* Excerpted Transcript of Trial on March 1-4, 1983, vol. II at 330 (testimony of Johnny Howard); *id.*, vol. III at 571 (testimony of Charles Sh[illegible]).

[4]We note that the admission of the tape recorded conversations raises no constitutional question regarding Clifford's sixth amendment right to confront witnesses. Both Johnny and Charles testified and were available for effective examination regarding their statements, thus satisfying the requirements of the confrontation clause. *See United States* v. *Green*, 548 F. 2d 1261, 1267-68 (6th Cir. 1977).

The district court admitted the tapes against Clifford pursuant to Fed. R. Evid. 801(d)(2)(E) which provides: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."[5] We find that the recorded conversations fail to satisfy the requirements for the admission of coconspirators' statements. In *United States* v. *Enright,* 579 F. 2d 980, 986 (6th Cir. 1978), this court held that for statements to be admissible pursuant to Rule 801(d)(2)(E) the government must show by a preponderance of the evidence three elements: (1) a conspiracy existed; (2) the defendant against whom the hearsay is admitted was a member of that conspiracy; *and* (3) the hearsay statement was made in the course and furtherance of the conspiracy. *See also United States* v. *Hamilton,* 689 F. 2d 1262, 1268 (6th Cir. 1982), *cert. denied,* 459 U. S. 1117, 103 S. Ct. 753, 74 L. Ed. 2d 971 (1983); *United States* v. *Vinson, supra,* 606 F. 2d at 152. Defendants argue only that the government has failed to establish the third element of *Enright.*[6]

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[5]Although this circuit does not require an evidentiary hearing or specific findings by the district court before the admission of statements pursuant to Fed. R. Evid. 801(d)(2)(E), *see United States* v. *Vinson,* 606 F. 2d 149, 152-53 (6th Cir. 1979), *cert. denied,* 444 U. S. 1074, 100 S. Ct. 1020, 62 L. Ed. 2d 756 (1980), we are disturbed that the court held no hearing and made no findings in the instant case where the admissibility of the statements is not at all obvious. A hearing or specific findings would have helped the district court to correctly determine the admissibility of the statements and would have facilitated this court's review.

[6]Because we find that the government failed to prove the third element of *Enright,* we do not address the first two elements. We note, however, that there is little evidence before this court that Clifford was a part of a conspiracy between Johnny and Charles. The paucity of evidence on the second element causes us considerable concern as we explain *infra* at 231.

[9, 10] We reject defendants' claim that the recorded statements were not made during the course of the conspiracy. Hearsay statements made after a conspiracy has terminated are not admissible in the federal courts. *See Krulewitch* v. *United States,* 336 U. S. 440, 442-43, 69 S. Ct. 716, 717-18, 93 L. Ed. 790 (1949). A conspiracy is deemed to have ended when the last objective sought is achieved, when all co-conspirators have been arrested, or when achievement of the objective has otherwise been rendered impossible. *See Wong Sun* v. *United States,* 371 U. S. 471, 490, 83 S. Ct. 407, 418, 9 L. Ed. 2d 441 (1963); *United States* v. *Hamilton, supra,* 689 F. 2d at 1268-69. Defendants claim that their alleged conspiracy involved burning down the house and that the conspiracy ended when the house burned. The government responds, and we believe, that the conspiracy alleged in the instant case was one to defraud the insurance company. The final objective of the conspiracy was to obtain the insurance proceeds, and this objective was still being sought when the recorded conversations took place. Thus, the conspiracy had not ended. *See also United States* v. *Xheka,* 704 F. 2d 974, 985-86 (7th Cir.), *cert. denied,* ____ U. S. ____, 104 S. Ct. 486, 78 L. Ed. 2d 682 (1983) (conspiracy to defraud insurance company does not end when business burns but continues "until defendants obtain the insurance money or abandon their quest").

[11] Although we conclude that the recorded conversations took place during the course of the conspiracy, we cannot find that the statements were made in furtherance of the conspiracy. The statements did nothing to advance what we have determined to be the remaining objective of the conspiracy, which was to obtain the insurance proceeds. *Cf. United States* v. *Xheka, supra,* 704 F. 2d at 986 (statements intended to keep coconspirator in the conspiracy were made in furtherance of the conspiracy); *United States*

v. *Hamilton, supra,* 689 F. 2d at 1269-70 (orders to purchase stolen goods placed by coconspirator and statements concerning plans to collect money on orders were made in furtherance of the conspiracy to traffic in stolen goods); *United States* v. *Lang,* 589 F. 2d 92, 100 (2d Cir. 1978) (statement by coconspirator to uncover agent posing as potential buyer of counterfeit bills revealing that another coconspirator had been arrested with counterfeit money and warning agent to be careful was not in furtherance of conspiracy to distribute counterfeit bills); *United States* v. *Wilson,* 490 F. Supp. 713, 717 (E.D. Mich. 1980) ("Narrative declarations . . . have never been considered to be made in furtherance of a conspiracy."), *aff'd,* 639 F. 2d 314 (6th Cir. 1981).

[12] The government argues that the statements contained in the taped conversations were directed at avoiding detection. In *Krulewitch* v. *United States, supra,* 336 U. S. at 443-44, 69 S. Ct. at 718, the Supreme Court held that declarations made after a conspiracy has terminated in an attempt to prevent detection are not statements made in furtherance of the main conspiracy and are inadmissible under the federal rules. *See also Grunewald* v. *United States,* 353 U. S. 391, 401-02, 77 S. Ct. 963, 972, 1 L. Ed. 2d 931 (1957); *Lutwak* v. *United States,* 344 U. S. 604, 616-18, 73 S. Ct. 481, 488-89, 97 L. Ed. 593 (1953). The government tries to distinguish *Krulewitch* from the instant case. Avoiding detection, according to the government, was not merely "an implicit subsidiary phase of the conspiracy," *Krulewitch* v. *United States, supra,* 336 U. S. at 443, 69 S. Ct. at 718, but was necessary to achieve the underlying goal of obtaining the insurance proceeds. We might be persuaded if the statements made by Johnny and Charles were directed at avoiding detection by the insurance company. Johnny and Charles, however, discussed only how to avoid detection by the state police. Detection of a continuing

illegal conspiracy will always thwart any remaining objectives of the conspiracy. Thus, to accept the government's position before this court would be to hold that statements directed at avoiding detection are admissible anytime that the conspiracy is continuing. The rule enunciated in *Krulewitch,* that avoiding detection is not necessarily a part of the main conspiracy, cannot be construed so narrowly. Some link must be established between the attempt to avoid detection and some remaining objective of the conspiracy. The government must still prove both that a "central aim of the conspiracy . . . continued in being" and that the declarations directed at "concealment . . . were at least partly calculated to further this aim." *Grunewald* v. *United States, supra,* 353 U. S. at 415, 77 S. Ct. at 979. The government has failed to establish that the statements contained in the tape recordings were partly calculated to further the continuing aim of obtaining the insurance proceeds.

The government contends that the "issue" with respect to the course and furtherance requirement is "whether the evidence is basically reliable; whether it is 'fair' to permit its introduction; and, whether the evidence (statement) relates in some way to the conspiracy itself." Brief for the United States at 60. *See also United States* v. *Smith,* 520 F. 2d 1245, 1247 (8th Cir. 1975); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(2)(E)[01], at 801-169 to 172 (1981). We agree. It is because the statements by Charles and Johnny which incriminate Clifford lack any indicia or reliability and because it is unfair to admit the statements as evidence against Clifford that we find them inadmissible. We are most troubled by the fact that one of the conversants was a government informant who was being rewarded for eliciting incriminating statements. We find entirely unreliable any statements made by the informant. We also find unreliable statements elicited from

Charles regarding Clifford's involvement in the conspiracy. Although one is unlikely to adopt incriminating statements concerning oneself, there is no reason to believe that one will necessarily speak out to exculpate another. We are further troubled by the paucity of the evidence (other than the taped conversations) linking Clifford to the conspiracy. The government admits that its case against Clifford was "mostly circumstantial." *See* Brief for the United States at 8. Although we are not prepared to hold that the evidence was insufficient as a matter of law to establish Clifford's involvement in the conspiracy, we cannot disregard the weakness of the evidence in considering the reliability of an alleged co-conspirator's out-of-court statements. One can imagine a case in which a person deliberately makes incriminating but untrue statements about another to a known government informant. *Cf. Krulewitch* v. *United States, supra,* 336 U. S. at 456, 69 S. Ct. at 724 (Jackson, J., concurring) ("Conspirators, long after the contemplated offense is complete, after perhaps they have fallen out and become enemies, may still incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations out of court."). We must rigorously enforce the standards set forth in *Enright* to avoid the admission of unreliable hearsay. *See United States* v. *Lang, supra,* 589 F. 2d at 99-100; 4 J. Weinstein & M. Berger, *supra,* ¶ 801(d)(2)(E)[01], at 801-73 to 74.

[13, 14] Even if we found that the statements made by Charles were admissible as evidence against Clifford, we would have to reverse Clifford's conviction because Johnny's statements were also admitted as evidence against Clifford. Johnny had turned government informant at the time of the taped conversations and thus was no longer a coconspirator. *See United States* v. *Xheka, supra,* 704 F. 2d at 986 n. 6; *United States* v. *Smith,* 623 F. 2d 627, 631 (9th Cir. 1980). Johnny's statements were admissible

against Charles as adoptive admissions. *See* Fed. R. Evid. 801(d)(2)(B). There is no basis, however, for admitting Johnny's statements against Clifford. *See United States* v. *Xheka, supra,* 704 F. 2d at 986 n. 6. Thus, the district court erred in failing to give a limiting instruction regarding Johnny's statements. *See Lutwak* v. *United States, supra,* 344 U. S. at 618, 73 S. Ct. at 489.

VI

For the foregoing reasons, the conviction of defendant Charles Shelton is affirmed and the conviction of Clifford Howard is reversed and remanded.

ENGEL, Circuit Judge, dissenting in part and concurring in part.

I would affirm the convictions of both defendants. I therefore respectfully dissent from part V of the majority opinion which holds that the admission of the tape recordings of the conversations between Johnny Howard and Charles Shelton, as evidence against Clifford Howard, constituted reversible error as to him.

Judge Swygert has very carefully summarized the evidence. My disagreement is with the majority's conclusion that "the government has failed to establish that the statements contained in the tape recordings were partly calculated to further the continuing aim of obtaining the insurance proceeds." I believe that the jury could find that the statements were calculated to further the continuing conspiratorial aim of obtaining the insurance proceeds.

First, it is necessary to remember the relationship of the parties in connection with the taped conversation. Johnny Howard was the informer. Charles Shelton was an alleged conspirator with his sister Harriet and the latter's husband, Clifford Howard, in a plan to burn down Harriet and Clifford's home in order to collect the insurance proceeds. Second, the majority opinion acknowledges

that the conversations were made when the conspiracy was still continuing. The conversations were made after the fire but before receipt of the insurance proceeds.

The taped conversations plainly indicates that co-conspirator Charles Shelton was concerned about collecting the insurance proceeds, and specifically his interest in the $8,000 he had coming on the settlement. The gist of the taped conversation between Johnny Howard and Charles Shelton was their concern not to risk any further illicit activity while the investigation was pending because of Clifford's concern that Howard was being "set up" by the police. Shelton told Howard how "They're supposed to come in there and dig every . . . thing up. Hunting for dynamite," Shelton stated that he personally knew, apparently from a conversation with Clifford, that there was no dynamite involved, and he acknowledged to Johnny Howard that he had used 40 gallons of gasoline which "didn't burn, it blowed . . ." Shelton clearly demonstrated his concern over the ongoing police investigation not only because it might implicate Clifford Howard and himself, but because it would frustrate the payment of the insurance proceeds. I can read the transcript in no other way. In such circumstances, I can see no value to a rule which holds inadmissible statements of co-conspirators made during the course of a conspiracy when the statements concern not only the criminal investigation and possibility of detection, but also the success of the conspiracy.

The majority opinion expresses some concern about the reliability of the statements. It may be that the statements of Johnny Howard were unreliable since he was an informer, knew that he was being taped, and had an interest in protecting himself. However, no such motive attaches to Charles Shelton, for Shelton did not know at that time that Johnny Howard was an informer. Shelton's testimony, which directly implicates Clifford Howard, therefore

has a ring of reliability. Further, Shelton's concern for the welfare of his sister, and about getting his $8,000 cut of the proceeds supports the reliability of the statement. In addition, since Charles Shelton testified, Clifford Howard presumably could have challenged Shelton's testimony through cross-exam. Even if there was a question of reliability, that question is for the jury and not for us.

The majority opinion professes not to address the first two elements of *Enright* (see footnote 6), but then goes on to observe: "We note, however, that there is little evidence before this court that Clifford was a part of a conspiracy between Johnny and Charles." Our court, however, has adhered to the general rule of conspiracy law that once a conspiracy has been established, only slight evidence is required to connect a particular defendant with the conspiracy, provided of course that the evidence is sufficient to satisfy the jury of guilt beyond a reasonable doubt. *United States* v. *Mayes,* 512 F. 2d 637, 647 (6th Cir. 1975); *United States* v. *Chambers,* 382 F. 2d 910 (6th Cir. 1967). The direct evidence against Clifford Howard is slight, but the circumstantial evidence is quite convincing, construing it as we must, in the light most favorable to the government. *See Glasser* v. *United States,* 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). It was Clifford who, with Charles' sister Harriet, owned the house which burned and who was a named insured on the fire insurance policy issued by Grange Mutual Insurance Company. Clifford was admittedly in financial difficulties, and shortly before the fire the house had been designated for public sale and mortgage foreclosure. Under those circumstances, it is difficult to see how Harriet's brother could conceivably have hoped to participate in the proceeds to the extent of $8,000 without Clifford's knowledge and participation in the scheme. The absence of Clifford from town and the absence of his wife

and children from the home at the time of the fire are consistent with foreknowledge of the planned fire.

In summary, I find no reason for the restriction which the majority would append to the conspiracy exception to the hearsay rule. It has no bearing on the reliability of the hearsay statement itself. The statement is relevant and should be admissible.

APPENDIX B—Magistrate's Report and Recommendation, Magistrate Joseph M. Hood, United States District Court for the Eastern District of Kentucky (April 29, 1983)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG

Criminal Action No. 82-12

UNITED STATES OF AMERICA, - - - - *Plaintiff,*

v.

CLIFFORD HOWARD and
CHARLES WAYNE SHELTON, - - - *Defendants.*

MAGISTRATE'S REPORT AND RECOMMENDATION

—Filed May 20, 1983

On March 4, 1983, a jury found both defendants guilty on the charges set forth against them in counts 1, 2, 5 and 9 of the above-styled indictment.[1] The defendants thereafter moved the Court for a new trial on the ground that, *inter alia,* certain jurors may have withheld on voir dire material information concerning relationships with law enforcement officers; past, unfriendly experiences with members of the defendants' families; and knowledge of the fact and nature of alleged criminal offenses with which the defendant Shelton had previously been charged.[2] The motion was

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[1]The remaining counts of the indictment had previously been dismissed. Record, No. 54.

[2]Defendants also contended that at least one juror during the trial received, but did not report, one or more telephone calls regarding the case and that extraneous prejudicial information may have been brought before the jury.

referred to the undersigned United States Magistrate with directions to conduct an evidentiary hearing and to submit a report and recommendation. 28 U.S.C. § 636(b)(1)(B)-(C). The evidentiary hearing was held at Covington on April 29, 1983 with defendants and their counsel present.

At the hearing, defendants produced six witnesses who testified that jurors Dannie Crislip, Sandra R. Huffman and Tamyra Black withheld material information on voir dire. The testimony of defendants' witnesses pertaining to each juror and the particular juror's responsive testimony follows below.

SANDRA R. HUFFMAN

Deborah Gail Stewart testified that she was acquainted with Sandra R. Huffman because she attended high school with the juror's sister, Dedra Huffman Setters. According to Stewart, Huffman's sister was, during the trial of the cause, married to an individual who was a police officer in Portsmouth, Ohio. Defendants contend Huffman failed to disclose her relationship to the police officer when asked, "Do any of you have any relatives or close personal friends — not just an acquaintance — but a close personal friend who happens to be a law enforcement officer?" Record, No. 66, p. 66.

Huffman admitted at the hearing that her brother-in-law James Setters was a patrolman with the Portsmouth (Ohio) Police Department, Record, No. 84, p. 75, and that she was aware of this fact when asked the question quoted above. Record, No. 84, pp. 79-80. She conceded, and the transcript of proceedings on voir dire demonstrates, that she failed to disclose her relationship to a police officer even though other prospective jurors were quite candid. Record, No. 84, pp. 80-81. Although Huffman at the hearing stated that this relationship would not have influenced her decision in any way, Record, No. 84, p. 82, she did not

make an affirmative statement to that effect during voir dire.

The Supreme Court has recognized the peremptory challenge as being one of the most important of the rights secured to the accused. *Swain* v. *Alabama,* 380 U. S. 202, 219 (1965); *United States* v. *Blanton,* 700 F. 2d 298, 308 (6th Cir. 1983).

A new trial is necessary where a showing of bias is made. The bias of a prospective juror may be actual or implied, *viz.,* it may be bias in fact or bias conclusively presumed as a matter of law. A new trial must be granted where the undisclosed information would have resulted in the juror's disqualification for cause. *McCoy* v. *Goldstan,* 652 F. 2d 654, 659 (6th Cir. 1981). Bias shall also be presumed, and a new trial granted, when a juror deliberately concealed information or gave a purposefully incorrect answer. *Id.* Although the information that Huffman's brother-in-law was a police officer would probably not have disqualified her for cause, her deliberate concealment of that information warrants a new trial.

DANNIE CRISLIP

Paula Fosson-Bush testified that she was acquainted with Dannie Crislip inasmuch as they were both employees of the Bellefonte Country Club in Ashland, Kentucky. According to Fosson-Bush, when Crislip told her that he was going to be serving on a jury, she told him that a friend of hers — the defendant Shelton — was to be tried during that time, and Crislip wanted to know if Shelton was being tried over the auto theft ring again. Defendants contend that Crislip failed to disclose his knowledge of the fact and nature of the alleged criminal offenses with which the defendant Shelton had previously been charged.

Unlike the situation involving the juror Huffman, there was no specific question asked during voir dire regarding

the potential juror's knowledge of the automobile theft ring charges previously brought against Shelton. The potential jurors were asked to disgorge information they had regarding the case *sub judice,* but defense counsel failed to inquire into any matters pertaining to the jurors' familiarity with Shelton's prior difficulties even though counsel's ability to do so during voir dire was unrestricted. Hence, it is not necessary to determine whether the colloquy described by Fosson-Bush ever took place. A new trial is not warranted on this ground.

TAMYRA D. BLACK

Sonja Howard and Franklin "Chip" Howard — children of the defendant Howard and witnesses on his behalf at trial — testified that they believed Tamyra D. Black knew them for a variety of reasons. Chip Howard testified that he had fought Black's former boyfriend while he and Black were students at Boyd County High School. Sonja Howard testified that she had been involved in an automobile accident which resulted in the deaths of two friends of Black and in litigation arising out of the same incident.

Elmo Shelton, father of the defendant Shelton and father-in-law of the defendant Howard, testified that Black's brother had driven an automobile into a house he owned a year earlier and that Black's father reluctantly personally paid for the damages to the house and to the property of the lessee.

Defendants contend that Black failed to disclose her acquaintances with their families. They further assert that Black's failure to do so prevented them from developing a substantial possibility that she might unconsciously favor the other side given the unpleasant circumstances surrounding her acquaintances with their families.

Black testified she only became aware that Sonja Howard — an acquaintance — was the daughter of the defend-

ant Howard when Sonja Howard took the stand on her father's behalf at trial. Black testified that she was not aware of any fight between her friend and a person named Chip Howard and that she was not acquainted with Chip Howard in any event. Black also stated during her testimony that she became aware of her father's familiarity with the Shelton family as the result of a conversation with him the evening after the first day of trial, but claimed that her father did not disclose to her the basis for his knowledge and that she did not personally connect the Shelton defendant with her brother's automobile accident.

Defendants contend that Black's testimony regarding her failure to respond affirmatively on voir dire if she knew either defendant and/or their families is incredible. However, since defendants never identified the members of their families by name during voir dire, it is not difficult for the undersigned to accept her explanation that she did not connect the Howard children and Elmo Shelton with the defendants on trial when asked on voir dire.

The Howard children both testified for the defense. It is difficult to understand why they would not have advised their father and uncle of their familiarity with Black and their reasons for believing she might be biased once they saw her seated as a member of the jury. Had they done so, defendants' counsel could have timely apprised the Court of the situation.

Along the same line, defendants asked to Court to discredit Black's testimony that she did not connect them with Elmo Shelton and by virtue of that connection with her brother's automobile accident as being implausible. However, Black's testimony is no less implausible than defendants' implicit assertion that they were unaware of the problems Elmo Shelton had with the family of Walter Black, a member of the Boyd County Board of Education,

and could not have instructed their counsel to address this matter on voir dire.

Since I am convinced that Black purposely did not conceal information on voir dire, it is concluded that defendants' right to exercise their peremptory challenges after voir dire was not impaired. A new trial on this ground is not warranted.

Accordingly, it is recommended that defendants' motion for a new trial be granted on the ground that Huffman purposely failed to disclose her relationship to a police officer when she was under a continuing duty to do so.

Objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *United States* v. *Walters,* 638 F. 2d 947 (6th Cir. 1981).

This the 19th day of May, 1983.

(s) Joseph M. Hood
Joseph M. Hood
United States Magistrate

Copies: U. S. Attorney
Robert Templeton
David Hagerman

APPENDIX C—Opinion and Order, Judge William O. Bertelsman, United States District Court for the Eastern District of Kentucky (June 9, 1983)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG

Criminal No. 82-12

UNITED STATES OF AMERICA - - - - *Plaintiff*

v.

CLIFFORD HOWARD
CHARLES SHELTON - - - - - *Defendants*

OPINION AND ORDER—Filed June 9, 1983

This matter is before the court on the objections of the United States and the defendants to the Report and Recommendation of the United States Magistrate, Joseph M. Hood, filed herein on May 20, 1983. The report and recommendation addressed itself to defendants' motion for a new trial on the ground of alleged jury misconduct. The facts are adequately stated in the report and recommendation of the magistrate, except as hereinafter noted.

The magistrate recommended that the court grant the motion for new trial because of omissions to the answers of certain questions on *voir dire* by juror Sandra R. Huffman. The court is of the belief that the magistrate misconstrued the law with regard to this issue and that the objection of the United States to the report and recommendation of the magistrate must be sustained and the motion for a new trial denied on this ground.

The defendants rely heavily on the case of *McCoy* v. *Goldston,* 652 F. 2d 654 (6th Cir. 1981). In the opinion of this court both they and the magistrate have misconstrued that decision and have overlooked the later decision of the Supreme Court of the United States in *Smith* v. *Phillips,* 455 U. S. 209 (1982). The Court will discuss both decisions.

McCoy was a civil rights §1983 civil action against certain police officers for alleged brutality. Following a verdict for the defendants, it was disclosed that one of the jurors was related to a person studying to be a probation officer and had failed to disclose that fact in response to certain relevant questions on voir dire. Upon motion for a new trial, the district court refused to hold an evidentiary hearing. The Court of Appeals reversed holding that an evidentiary hearing was required. The court stated:

> "We come, then to the question to be decided: whether plaintiffs have alleged facts which establish a *prima facie* case that their 'right to peremptory challenge was prejudicially impaired.' If so, then the district court must conduct a formal inquiry into the juror's alleged withholding of information during *voir dire.*
>
> "First, deliberate concealment or purposefully incorrect responses during *voir dire* suffice to show a prejudicial impairment of the right to the exercise of peremptory challenges. A district court should consider the following factors to determine if a juror has intentionally concealed or purposefully given incorrect answers:
>
> "A. Whether the question asked sufficiently inquired into the subject matter to be disclosed by the juror.

"B. Whether the response of other jurors to the question asked would put a reasonable person on notice that an answer was required.

"C. Whether at any time during the trial the juror became aware of his false or misleading answer and failed to notify the district court.

"Second, a prejudicial impairment of the right to the exercise of peremptory challenges also is established if the undisclosed information is indicative of probable bias concerning either a material aspect of the litigation or its outcome."

McCoy, 652 F. 2d at 658 (citations omitted). In dicta, the court in *McCoy* discussed the standards district courts should apply in determining whether a new trial is warranted:

"It is appropriate to set forth the standard for district courts to apply in deciding whether a new trial is necessary because a juror failed to disclose information during *voir dire*. As noted above, the Constitution guarantees litigants in a civil case a fair and impartial tribunal, free from actual bias or prejudice. *Consequently, a showing of juror bias is the touchstone to determine whether to grant a new trial.* (citations omtted)

"The bias of a prospective juror may be actual or implied, that is, it may be bias in fact or bias conclusively presumed as a matter of law.' Applying these principles, we hold that a new trial must be granted whether the undisclosed information would have resulted in the juror's disqualification for cause. This occurs when either the juror admits a feeling of partiality or 'the judge makes a pragmatic judgment that there is a substantial possibility of the juror uncon-

> sciously favoring one side of another.' He also hold that a district judge shall presume bias, and grant a new trial, when a juror deliberately concealed information or gave a purposefully incorrect answer. A finding of deliberate concealment or mendacious conduct shall be guided by the factors set forth on Section II of our opinion."

Id. at 659 (citations omitted) (emphasis added). Thus, motions for new trials are to be granted if undisclosed information would have resulted in a juror's disqualification for cause or if the undisclosed information was deliberately concealed.

The magistrate found that the information withheld by Huffman would not have disqualified her for cause. The defendants have not objected to ths finding. This court, therefore, sees no reason to discuss this issue further.

On the other hand, the magistrate did find that Huffman deliberately concealed the fact that her brother-in-law is a police officer. On the basis of this finding, the magistrate recommended that this court grant defendant's request for a new trial.

This court disagrees with the magistrate's finding and holds that it is clearly erroneous. Before the factors enunciated in the *McCoy* court are applied, it would be helpful to explain briefly what conduct merits a presumption of juror bias. The *McCoy* court said that a deliberate concealment or purposefully incorrect answer warranted a presumption of juror bias. What must be found is "mendacious conduct." *Id.* Simply put, did Huffman lie?

The first factor in *McCoy* is whether the *voir dire* question asked "sufficiently inquired into the subject matter to be disclosed by the juror." *Id.* at 658. There is no doubt that this factor weighs against a finding that Huffman responded truthfully. The question propounded by counsel

for defendant Howard was seemingly clear: "Do any of you have any relatives or close personal friends—not just an acquaintance—but a close personal friend who happens to be a law enforcement officer?" (*Voir Dire* transcript, p. 66) It is conceded that Huffman does have a brother-in-law who is a police officer in the Ploce Department of Portsmouth, Ohio. It would appear that the question asked for information that Huffman should have revealed. But the court finds that this failure to respond was not "mendacious conduct" but the result of an honest misunderstanding.

The second factor to be considered under *McCoy* is "whether the response of other jurors to the question asked would put a reasonable person on notice that an answer was required." *Id.* This factor can be interpreted to favor either the state or the defense. Five members of the venire responded that they were related to law enforcement personnel. (Another individual sad he was a former police officer).

However, this court cannot look at these responses in a vacuum. After each venireman responded that he or she had a relative employed in law enforcement work, defense counsel immediately asked whether this relationship would affect his or her judgment. To this second question, all the veniremen responded that it would not affect their judgment. Subsequent to this response, each venireman sat down and was retained as a prospective juror. The court believes these events, not "mendacious" intent, caused Huffman not to respond.

The follow-up question asked by defense counsel and the veniremen's responses to that question evidently misled Huffman, making her believe that she need not respond to the first question if her response to the second question was in the negative. This was explained by Huffman dur-

ing the hearing. When Huffman was asked why she had not responded to defense counsel's question, she replied:

> "Well, they were asking, in other words, if it would have any effect if I was chosen to sit on the jury, would it make a difference in what I decided. It wouldn't have any effect whatsoever, and he was in the State of Ohio, and I just—this was my first time being called to jury service, and I just didn't realize that it would be important, you know, that I didn't mention his name."

(Hearing transcript, p. 80) Throughout the hearing, Huffman repeatedly said she did not respond to the *voir dire* question concerning police officers because it was "not important" to her, it did not make any difference, and it would not influence or affect her decision. The thrust of all of these comments, when taken in context, is this: she did not reveal that he brother-in-law was a police officer because she believed this information was irrelevant. Because it would not affect her judgment to sit as an impartial juror, she did not think she was compelled to respond. She did not intend to deceive or mislead anyone.

Huffman testified that her failure to answer was not motivated by a desire to conceal information, but was based on an honest mistake:

> "Q. So, in effect, and I want to be clear about it, so please correct me if I'm wrong. In effect, what happened was that you did not answer the question truthfully?
>
> "A. I did not answer the question at all.
>
> "Q. Well, if you were to have answered that question truthfully, you should have stood up and said, 'my brother-in-law is a policeman in Portsmouth,' correct?

"A. No.

"Q. You didn't do that, did you?

"A. No, I didn't.

"Q. And, you did—and, you failed to do that as I understand your testimony, because you, yourself, decided that it was not important, is that correct?"

"A. That is right, I didn't. It had no bearing—it wouldn't affect me in any way. When everyone began to stand up and tell their reasons why, and then they would say, 'well, if you were chosen to be a juror, would that make any difference whatsoever to you.' And, of course, everyone was saying, 'no.' And I knew that there was no—I had nothing to hide by not telling it. There was no reason why I shouldn't have told it, but I just didn't. It was an honest mistake on my part. I will know in the future, I will say something."

(Hearing transcript, pp. 88-89). The misunderstanding Huffman labored under is not far-fetched. Her non-disclosure is explained by the fact that the veniremen who revealed their relationship to law enforcement personnel were immediately asked whether it would affect their judgment, and when their response was negative, they were not excused by the court.

It should also be noted that this case was the first time Huffman had ever been called for jury service. This was her first experience with *voir dire*. She was in every sense of the word a layman in regards to the law. It is not surprising that Huffman misunderstood the exact nature of her responsibility to answer *voir dire* questions.

The evidence overwhelmingly establishes that Huffman's failure to respond was an honest mistake. Huffman failed to respond because she honestly believed that she did not have to answer the question. During the hearing, she re-

peatedly said that she believed that her answers were forthright and truthful. She stated that she did not intend to conceal information or give incorrect responses. She said she made an honest mistake. In light of the preceding discussion, the court is convinced of Huffman's veracity. Defense counsel tried mightily to force Huffman to admit that she had lied. In this endeavor, defense counsel was singularly unsuccessful. Her reasons for not responding ring true.

At least this much is clear, Huffman's failure during *voir dire* to disclose that her brother-in-law was a police officer is not an example of mendacious conduct. Huffman did not conceal information; she did not lie. Accordingly, under the authority of *McCoy,* this court cannot presume bias on the part of Huffman. Not only have the defendants failed to prove that Huffman deliberately concealed information or purposefully gave an incorrect response, but the evidence affirmatively demonstrates that her responses were intended to be truthful.

Finally, *McCoy* is distinguishable from the present case because this court did grant defendant's request for a hearing. At this hearing, defendants had the opportunity to prove that Huffman and the other jury members were actually biased. Defense counsel failed to prove actual bias. Without such a demonstration, this court is reluctant to find bias and grant a new trial.

The court holds further that the following language of the Supreme Court of the United States in *Smith* v. *Phillips* is controlling herein.

> "These cases demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally accept-

> able. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. *Due process means a juror capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.* Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case."

455 U. S. at 217. Having carefully presided over this trial, the court believes that the above standard has been met, and the transcript of the post-trial hearing bears out this finding.

By way of shortening this opinion, the court will state that it agrees with the analysis of the above and other authorities discussed in the able brief of the United States in support of its objections.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That the objections of the United States to the conclusion of the magistrate that a new trial is required by reason of the *voir dire* responses of the juror Huffman be, and they are, hereby sustained and such conclusion is hereby set aside.

2. The objections of the defendants to the other findings of the magistrate were not timely filed. Nevertheless, the court has considered them and finds them to be without merit and they are hereby overruled.

3. The remainder of the report and recommendation of the magistrate is hereby confirmed and adopted by the court.

4. The following issue arising out of the post-trial motions remains to be heard:

Whether Tamyra D. Black during the trial was contacted by or had any improper private communication with an outside source about the case which would require a new trial.

5. Inasmuch as the docket of the court is less congested than it was in March and April and certain other reasons relating to the health of the undersigned, which required the earlier issues to be referred to the magistrate no longer exist, and in the interest of expediting these proceedings, the remaining issues are hereby set for hearing before the undersigned AT COVINGTON on July 5, 1983, at 10:00 A.M. The parties shall file witness lists with a concse but complete summary of the testimony expected from each witness, ten (10) days prior to the hearing.

This 9th day of June, 1983.

(s) William O. Bertelsman
Judge

BEST AVAILABLE COPY

United States of America vs. **United States District Court** for

DEFENDANT CHARLES WAYNE SHELTON — EASTERN DISTRICT OF KENTUCKY

CATLETTSBURG — DOCKET NO. → 82-12

JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 (9 82)

/Accovington

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH JULY DAY 20, YEAR 1983

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL ROBERT TEMPLETON and E. J. MALBOURN

(Name of Counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged / [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of: conspiracy to devise a scheme and artifice to defraud & obtain money by means of false & fradulent pretenses; willfully & knowingly using mails in scheme to defraud; willfully & knowingly devising scheme & artifice to defraud & obtain money by false & fradulent pretenses by transmitting in interstate commerce by means of wire communications, in violation of Title 18, Sections 371, 1341 & 2, and 1343 & 2, United States Codes.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

COUNT 1 - FIVE (5) YEARS IMPRISONMENT; COUNT 2 - FIVE (5) YEARS IMPRISONMENT; COUNT 5 - FIVE (5) YEARS IMPRISONMENT; COUNT 9 - FIVE (5) YEARS IMPRISONMENT.

IT IS ADJUDGED that the above imposed sentences are to be served CONSECUTIVELY.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ADJUDGED that the sentence imposed as to Counts 5 and 9 be and hereby is SUSPENDED and the defendant is placed on probation for a period of FIVE (5) YEARS, upon release.

A Presentence Report was submitted to the Court and copies furnished counsel pursuant to Rule 32, Federal Rules of Criminal Procedure.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE 7-21-83

By Mary N. Yelton

( ) CLERK

(✓) DEPUTY

SIGNED BY

[XX] U.S. District Judge

[ ] U.S. Magistrate

WILLIAM O. BERTELSMAN, JUDGE JULY , 1983

EXHIBIT A

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

_____

United States Marshal.

By _____

Deputy Marshal.

GENERAL CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall, during the period of probation, conduct himself as a law-abiding, industrious citizen and observe all conditions of probation prescribed by the court. **TO THE DEFENDANT** — You shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any change in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and r. oke probation for a violation occurring during the probation period.

Maximum probation period (per indictment or information) which may be imposed on defendant eligible for sentencing under the Youth Corrections Act, 18 U.S.C. § 5005 et seq., is one year for conviction of a misdemeanor or six months for conviction of a petty offense.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted appeal on _____

Defendant released on _____

Mandate issued on

APPENDIX E—Order and Judgment of the United States Court of Appeals for the Sixth Circuit (entered January 11, 1985; issued as mandate April 3, 1985)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 83-5434, 83-5436
83-5533, 83-5534

UNITED STATES OF AMERICA, - - - *Plaintiff-Appellee,*

v.

CLIFFORD HOWARD (83-5434, 83-5533),
CHARLES WAYNE SHELTON (83-5436, 83-5534), - *Defendants-Appellants.*

Before: ENGEL and MARTIN, Circuit Judges; and SWYGERT, Senior Circuit Judge.

JUDGMENT—Filed January 11, 1985

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed as to the conviction of defendant Charles Shelton, reversed and remanded as to the conviction of defendant Clifford Howard.

No costs taxed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

(s) John Hehman
Clerk

A True Copy.

Attest:

(s) Nancy Schulkens, Deputy Clerk

Issued as Mandate: April 3, 1985
Cases 83-5436, 83-5534 ONLY

COSTS: NONE

APPENDIX F—Order of the United States Court of Appeals for the Sixth Circuit Denying Rehearing (March 20, 1985)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5436/5534

UNITED STATES OF AMERICA, - - - *Plaintiff-Appellee,*

v.

CHARLES WAYNE SHELTON, - - *Defendant-Appellant*

ORDER—Filed March 20, 1985

BEFORE: ENGEL and MARTIN, Circuit Judges, and SWYGERT*, Senior United States Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

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*Hon. Luther M. Swygert sitting by designation from the United States Court of Appeals for the Seventh Circuit.

APPENDIX G—Excerpts from Voir dire of jury panel before Judge William O. Bertelsman, United States District Court for the Eastern District of Kentucky (February 28, 1983)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT CATLETTSBURG

Catlettsburg Criminal
82-12-1 and 82-12-2

THE UNITED STATES OF AMERICA, - - - - *Plaintiff*

v.

CLIFFORD HOWARD and
CHARLES WAYNE SHELTON, - - - *Defendants*

EXCERPTED TRANSCRIPT OF VOIR DIRE ON FEBRUARY 28, 1983—Filed March 17, 1983

The Excerpted Voir Dire of the Jury Panel given before The Honorable William O. Bertelsman, Judge of the United States District Court on the 28th day of February, 1983, at the trial of the above-styled action.

Appearances:

For the Government:

Fred A. Stine, Esq.
Assistant U. S. Attorney
P. O. Box 1490
Lexington, Kentucky 40591

John Compton, Esq.
Assistant U. S. Attorney
P. O. Box 1490
Lexington, Kentucky 40591

For the Defendants:

C. David Hagerman, Esq.
Attorney at Law
P. O. Box 610
Ashland, Kentucky 41105
For: Defendant Howard

Robert L. Templeton, Esq.
Attorney at Law
Suite 200, Galloway Building
1200 Bath Avenue
Ashland, Kentucky 41105
For: Defendant Shelton

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E. J. Walbourn, Esq.
Attorney at Law
Suite 200, Galloway Building
1200 Bath Avenue
Ashland, Kentucky 41005
For: Defendant Shelton

Allen S. McClung
Official Reporter

* * * * * * *

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The Court: April 10th, 1981, the house actually burned. Now, ladies and gentlemen, it is necessary as you are probably aware in trying a case, whether it's a criminal case or a civil case, to make every effort to be sure that the case is tried by a fair and impartial jury who will decide the case on the evidence they hear and not on something they may have read in the papers or the fact that they know some of the parties or the attorneys or are involved in some similar event.

So we bring in more people than we're going to use and we ask questions of the jury panel, not to embarrass anyone or to pry into your business, but to assure that we have a fair and impartial jury to try this case,

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which involves serious matters.

So to do that it is necessary that the jury be asked certain preliminary questions and to do that it is necessary that the panel be placed under oath, which I will ask the Clerk to administer at this time.

(Prospective jury sworn.)

The Court: All right. Now I will ask certain questions and then I will permit the attorneys also to ask you certain questions solely directed to determining whether anybody knows anything about the case or is related to somebody or knows somebody that would disqualify them from being a juror in this case.

The first thing I want to advise you is that this case may last the rest of this week. I'm thinking if it's going to go into next week anyway of taking Friday off but it may last most of this week or all of this week; probably will last all of this week and may go over a day or two into next week.

* * * * * * *

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Mr. Stine: All right. I have to kind of skip over a little bit here because the Judge has so many of these questions. Has

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anybody here had — ever at any time in their lifetime had any specific contact with the United States Attorney's Office, not myself or Mr. Compton, but the United States Attorney's Office here in Catlettsburg or Lexington or anywhere else or had any specific contact with the Kentucky State Police or the FBI?

Anybody ever been — yes, ma'am? Would you tell us your name and number please?

Juror Kathy A. Dunaway: Kathy Dunaway, 101.

Mr. Stine: And what contact —

Juror Kathy A. Dunaway: The only contact that I ever had with the State Police was my house was broken in one time and they investigated it.

Mr. Stine: All right. Did that leave any particularly bad feeling or good feeling on your part? I mean —

Juror Kathy A. Dunaway: They just done the best they could.

* * * * * * *

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(Mr. Hagerman): We touched on the idea of any law enforcement officers or former law enforcement officers on this panel of prospective jurors and we did have a few responses to a question by Mr. Stine.

Let me ask if any of you ladies on the panel, perhaps maybe your spouse, is a police officer or a law enforcement personnel of some kind? Are there any of you ladies — I guess the flip side of that would be true too. We do have women policemen obviously.

If there are any of you on this panel whose spouse is a policeman or a law enforcement personnel, would you indicate by raising your hand.

I don't see any hands so I'll take it by that that

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we know who all the police are out there.

Now, this is sort of a related question. There will be — I'm certain there will be — law enforcement officers that will testify in this trial.

Now, my question is this: Is there anybody amongst you all who feels that the testimony of a law enforcement officer is inherently more believable and entitled to be given more credibility and weight than the testimony of just an ordinary citizen. Simply because that individual is a policeman, is there anybody that thinks that just because of that factor and that factor alone, that that person is more believable than someone, an ordinary citizen such as you or I? Is there anybody that feels that way?

And think about that for just a second, if you would, because that's — there will be police officers, I'm sure, testify in this case. Anybody have a problem with that?

All right. Are there any of you on the panel who are firemen or else your spouse is a fireman? That could be a volunteer fireman — Yes, sir. What's your name and number, sir?

* * * * * * *

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Mr. Compton: Mr. Walbourn.

Mr. Walbourn: Members of the prospective jury panel, first of all I apologize for having a cold. It's just unavoidable. As Judge Bertelsman told you earlier, my name is E. J. Walbourn and I'll be assisting Bob Templeton in this case.

I have just a few questions to ask you, but as Mr. Hagerman indicated earlier in asking the questions, Mr. Shelton is to be tried separately from Mr. Howard.

Just because we all sit at the same table and confer, Judge Bertelsman I believe at the appropriate time will instruct you that you have to judge the guilt or inocence of each one of these individuals on an individual basis. Do all of you understand — and again Judge Bertelsman will instruct you that you have to judge the guilt or innocence Mr. Shelton nor Mr. Howard in this case has a duty or an obligation to do anything, and that you can draw no adverse inference from that. Do all of you understand that proposition of law?

Let me ask you if any of you think that's wrong, that they should be required to do something? I take by your silence that you agree with that proposition and will have no trouble following Judge Bertelsman's

instructions.

Mr. Hagerman earlier asked and Mr. Stine earlier asked about if any of you were law enforcement officers or your spouse was a law enforcement officer and I know Mr. VanHoose and Mr. Crane indicated that at one time they had been.

Let me expand that question just a little bit. Do any of you have any relatives or close personal friends — not just an acquaintance — but a close personal friend who happens to be a law enforcement officer? Yes, sir, your number please?

Juror Gary E. Griffith: Gary Griffith, 186. My brother is the sheriff of Elliott County.

Mr. Walbourn: Is the sheriff, the high sheriff of Elliott County?

Juror Gary E. Griffith: Yes, sir.

Mr. Walbourn: Would the fact that you have a brother who is in law enforcement unduly influence your decision one way or another in this case? It's anticipated that there will be law enforcement officials that will testify. Do you think you could accept their testimony on the basis of what they say and not because of who they are?

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Juror Gary E. Griffith: I've run into all kinds of people in my 29 years of life and I find that you'll find law enforcement agencies to be just the same as you will with any individual you meet on the street.

Mr. Walbourn: Thank you very much. Anyone else please? Yes, sir. Your number?

Juror Frank E. Hereford: Frank Hereford, 113. My sister is a Federal Marshal out of Charleston.

Mr. Walbourn: Out of Charleston, West Virginia? Would the fact that — would that association or relationship have — give you any hesitancy or reluctance to sit on this jury?

Juror Frank E. Hereford: No.

Mr. Walbourn: Anyone else please? Yes, sir.

Juror Charles E. Sammons: I'm 140, Charlie Sammons. My brother's director of education at the F.C.I.

Mr. Walbourn: Tom Sammons?

Juror Charles E. Sammons: Yes.

Mr. Walbourn: All

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right. Would the fact that your brother works at the institution and associated with people who have been convicted of crimes, would that relationship cause you any concern sitting on this jury?

Juror Charles E. Sammons: No, sir.

Mr. Walbourn: I take it it would have no influence on you one way or another?

Juror Charles E. Sammons: That's right.

Mr. Walbourn: Thank you very much. Anyone else? Yes, ma'am?

Juror Myrtie A. Layne: Myrtie Layne, No. 122. Judge Asbury is my nephew.

Mr. Walbourn: All right. The fact that Judge Asbury is related to you and I know before he went to the bench was an active practitioner in this area, would that association or relationship influence you one way or another?

Juror Myrtie A. Layne: No.

Mr. Walbourn: Thank you very much. Anyone else? Yes, sir?

Juror Charles W. Burt: Charles Burt, Juror No. 150. I am an ex-police officer. I've been out of the business for 12 years or 10 years in the

State of Ohio, the city of Troy, Ohio.

Mr. Walbourn: Okay. You have been off for about 12 years?

Juror Charles W. Burt: Ten years.

Mr. Walbourn: Do you still have a lot of acquaintances that were police officers?

Juror Charles W. Burt: No, not really.

Mr. Walbourn: Okay. Thank you very much. Anyone else please? Yes, sir.

Juror Ray E. Jenkins: Ray Jenkins, No. 127. My newphew was the Assistant Chief of Police of Jefferson County, Kentucky.

Mr. Walbourn: What is your nephew's name please?

Juror Ray E. Jenkins: Jim Montgomery.

Mr. Walbourn: Would the fact that your nephew is such a high-ranking law enforcement officer, would that cause you any concern or give you any influence in this case?

Juror Ray E. Jenkins: No.

Mr. Walbourn: Thank you very much. Anyone else please?

(Silence.)

Mr. Walbourn: I just have a couple of questions but they may get kind of long. I don't want to go over who we anticipate all the witnesses in this case are.

We've taken care of a great number of those in some of the prior questions. And I don't mean to slight any witness that will be called and whose name I don't read.

But I want to read you off a list of some people and I'll break it into about thirds. These are the individuals we feel are the more prominent or likely to have their name known or that you would know them in the community, and I'll read about five or six and at that point I'm going to ask you if you know any of those people.

First of all, Andrew Reed, who is an investigator with the Kentucky State Police, I believe in the arson division. Of course, Mr. Asher and Mr. Klunder over here. Howard Bellamy who is a detective. I believe he is a detective with the Kentucky State Police.

John O. Price who is in real estate here in Ashland.

APPENDIX H—Excerpts from hearing before Magistrate Joseph M. Hood, United States District Court for the Eastern District of Kentucky (April 29, 1983)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
COVINGTON

Cat. Crim. 82-12

April 29, 1983

THE UNITED STATES OF AMERICA, - - - *Plaintiff*

v.

CLIFFORD HOWARD and
CHARLES WAYNE SHELTON, - - - *Defendants*

Before the HONORABLE JOSEPH M. HOOD, Magistrate of the District Court.

Appearances:

For the Government:
Mr. Frederick A. Stine
Attorney-at-Law
700 Campbell Towers
Newport, Kentucky 41071

For the Defendant:

Mr. Robert L. Templeton
Attorney-at-Law
1416 Winchester Avenue
Ashland, Kentucky 41101

For the Defendant:

Mr. Charles David Hagerman
Attorney-at-Law
P. O. Box 1554
Ashland, Kentucky 41101

Mr. Edwin J. Walbourn, III
Federal Public Defender
111 Church Street
P. O. Box 1489
Lexington, Kentucky 40591

* * * * * * *

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SANDRA R. HUFFMAN, called on behalf of the plaintiff, after being duly sworn, testified as follows:

The Court: Come around this way, please, ma'am.

Direct Examination by Mr. Stine

Q. Ma'am, state your full name and address for the record, please.

A. Sandra R. Huffman, 222 Outward Avenue, Poplar Highland, Raceland, Kentucky.

Q. Ms. Huffman, where do you work?

A. Bill Williamson.

Q. Pardon me?

A. Bill Williamson.

Q. What is that?

A. It's a wholesale hardware.

Q. Do you know a lady by the name of Debbie Stewart?

A. Debbie Stewart?

Q. Yes.

A. She was standing on the outside—I knew her as Debbie Grubb before she was married.

Q. Do you know somebody by the name of Debbie Stewart now?

A. No. I heard them say her name when they called her in and that's how I knew.

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Q. Do you recognize Debbie Grubb, was it?

A. Grubb.

Q. Yes. Do you recognize her here anywhere in the courtroom today?

A. Yes, un-huh.

Q. Would you point her out please?

A. She's back there in the pink dress (indicating).

Q. How long have you known her?

A. I would say for ten, twelve years maybe.

Q. Are you friends?

A. She was in school with my sister. I was never associated with her in any way.

Q. What is your sister's name?

A. Deidra Setters.

Q. Okay. And where does Deidra Setters live?

A. She lives in Portsmouth, Ohio.

Q. And, is your sister married

A. Yes, she is.

Q. To whom, please.

A. James Setters.

Q. Do you know what he does for a living?

A. He is a patrolman with the Portsmouth Police Department.

The Court: Is that James?

The Witness: Yes.

The Court: Is Setters, S-E-T-T-E-R-S?

The Witness: Yes, your Honor.

Direct Examination Resumed by Mr. Stine

Q. Now, how long have you known—how long has your sister been married?

A. I believe it will be five years in May.

Q. How long has Mr. Setters been a police officer?

A. Approximately five years. I am guessing at that, I'm not positively sure.

Q. And, how long have you known, or had this information?

A. About five years.

Q. Okay, do you recall February 28, 1983, when the attorneys, myself and Mr. Templeton, and Mr. Hagerman were asking questions of the jurors in an effort to pick a jury.

A. Yes.

Q. Do you remember a question that I asked from—and I'll quote from Page 52 of that transcript.

"Does anybody's—of all of the people here present, does anybody's knowledge of the defendants or the families or any similar factor cause you any embarrassment or cause you any hesitation in sitting

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on this case, because they are going to be asking you to return a verdict of guilty."

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Do you recall my asking that question?

A. I believe so, yes.

Q. Okay. Do you recall whether or not you answered that question. Can you recall any reason why you would have had to answer that question?

A. No.

Q. Okay. Do you recall later, and I believe that Mr. Hagerman asked that question. And, I'll quote from Page 55 of the transcript of the Voir Dire.

"If there are any of you on this panel whose spouse is a policeman or a law enforcement personnel would you indicate by raising your hand. I don't see any hands so I'll take it by that we know who all the police are out there."

Do you recall that question being answered?

A. I believe I would remember.

Q. Did you answer that question?

A. No, I'm no. narried, I'm not—

Q. Okay. Did you have any feeling that you should have answered that question?

A. No.

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Q. I believe that Mr. Hagerman went on to say at Page 56 of the transcript of the Voir Dire.

"Now, this is sort of a related question. There will be—I'm certain there will be law enforcement officers that will testify in this trial. Now, my question is

this: 'Is there anybody amongst you all who feels that the testimony of a law enforcement officer is inherently more believable and entitled to be given more credibility and weight than the testimony of just an ordinary citizen simply because that individual is a policeman, is there anybody who thinks that just because of that factor, and that factor alone that a citizen—that a person is more believable than someone, an ordinary citizen such as you or I; is there anyone that feels that way?

"And think about that for just a second if you would because that's—there will be police officers I'm sure testifying in this case. Anybody have a problem with that."

Do you recall that question being answered?

A. Yes, I do.

Q. —or being asked of you?

A. Yes.

Q. Did you answer that question?

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A. No, I didn't.

Q. Is there—Do you recall any feeling that you may have had that you should have answered that question?

A. None, whatsoever.

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Q. Do you feel—I'll put that same question to you right now. Do you feel that a law enforcement officer's testimony is inherently to be afforded any more credibility than any other witness:

Mr. Templeton: Your Honor, I don't think that is the point. I'm going to object to the relevancy of that. We're not going through Voir Dire. The question is whether she answered the question correctly on February 28, 1983, not what her feelings are on April 29, 1983.

The Court: Sustained.

Direct Examination Resumed by Mr. Stine

Q. I believe when Mr. Walbourn was asking questions during the Voir Dire—at Page 66, of the transcript of the Voir Dire, Mr. Walbourn said, and I'll read it to you.

> "Mr. Hagerman earlier asked and Mr. Stine earlier asked if there are any of you, pardon me, if any of you were law enforcement officers or your spouse was a law enforcement officer, and I know Mr. Van Hoose and Mr. Crane indicated at one time that they had been. Let me expand that question just a little bit. 'Do any of you have any relatives or close personal friends, not just an acquaintance, but a close personal friend who happens to be a law enforcement officer.' "

Do you remember that question being asked?

A. Yeah.

Q. Do you recall whether or not you answered that question?

A. No, I did not say anything at that time.

Q. Why didn't you say anything at that time?

A. Well, they were asking, in other words, if it would have any effect if I was chosen to sit on the jury, would it make a difference in what I decided. It wouldn't have any effect whatsoever, and he was in the State of Ohio, and I just—this was my first time being called to jury service, and I just didn't realize that it would be important, you know, that I didn't mention his name.

Q. What does the term "relative" mean to you?

A. Relative is like an aunt, uncle, someone who is a relative by marriage, someone related to me.

Q. Do you consider your sister's husband to be a relative of yours?

A. Yes, he is.

Q. When the question was asked, if any of you have any relatives or close personal friends who hapens to be a

law enforcement officer, why didn't you answer the question?

A. Well, I just didn't—I just didn't think, myself, that it was that important to me. I guess I

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may have been wrong. It may have been important to someone else, but I knew that it wouldn't effect me in any way. And, like I said, it was my first time being called back to jury service, and I just didn't realize — I just didn't stand up and say anything.

Q. Do you recall whether anybody else answered that question?

A. I believe Mr. Sammons, one of the jurors, I believe that he had a brother or something like that, that worked at a Federal prison or something. I believe that he stood up and said something.

Q. Did you recall anybody else standing up. Do you recall whether more than one person stood up and answered that question?

A. I don't — I don't recall, I don't remember.

Q. Did the fact that somebody else stood up and answered that question cause you to feel that you should stand up and answer that question?

A. No.

Q. Did you consider your answer misleading?

A. I didn't, myself, no.

Q. Did you feel that you were being purposely incorrect by not answering that question?

A. No, at the time I didn't feel it —

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Q. Well, how can you swear that with your statement that you believe, that you feel your sister's husband to be a relative of yours?

A. Well, I just — his being out of the state, he was in the State of Ohio, and I just didn't — I guess I should have

stood up and said and told about him, but at the time I thought, well, it really didn't make that much difference. It wouldn't influence my decision one way or the other, and so I just didn't stand up and say anything.

Q. Did you feel that you were concealing information?

A. No, I didn't.

Q. Was there any — any time during the trial did you ever reflect back on that question?

A. No, I didn't.

Q. At any time prior to rendering a decision in the case, did you reflect back on whether or not you should have answered that question or not on your own?

Mr. Templeton: Objection, your Honor.

Mr. Hagerman: Objection, 606 —

Mr. Stine: Your Honor, according to the McCoy case, I think the question is perfectly permissible. I think — in fact, I think it is the third question that the case says to ask.

It is just plain on its face. It is just what the case

says to ask.

Mr. Templeton: Your Honor, the issue is whether Miss Huffman, for whatever reason honestly or inadvertently, whatever, answered the question on the morning of February 28, 1983. I think she has answered that, and in just about every way that it can be answered. I think this is all irrelevant.

The Court: Let me see the case.

(At the bench.)

Mr. Stine: I believe it is on Page 658, your Honor. If you would like the — if the Court feels the Court should take the witness through those questions, that's fine, but I think the case is pretty clear. It says, to answer those questions and that is how you make the determination.

Mr. Templeton: I think we have a bifurcated procedure here, if I understand what we're going through. Our inquiry this afternoon is directed as to whether or not the jurors that are here truthfully answered or otherwise responded to the questions on Voir Dire on the morning of February 28, 1983.

The Court: I think the third question he would like to ask is — I think that it is within the range of what we are doing here today. Let me ask the

question though.

(To the witness) Miss Huffman, during the trial, did you understand that you had the responsibility to advise, at anytime during the trial, did you realize your answer was false?

The Witness: No, I didn't — It was just like I say — I didn't — It was the first time I had ever been called to jury service and I didn't realize that it would be that important of a factor. That was all there was to it.

The Court: That's fine. May I have a cite on that, please?

Mr. Templeton: 652 F. 2d 654 (1981).

The Court: Any further questions?

Mr. Stine: Pardon?

The Court: Any further questions?

Mr. Stine: There may be, your Honor, I just want to look here a little bit.

Your Honor, I don't have any further questions of this witness.

Cross-examination by Mr. Templeton

Q. If I asked you today if you happened to have a relative — if you have a relative —

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Mr. Stine: Objection, your Honor. It's the same question. It's the thing that I tried to do earlier and he interrupted me and you sustained the objection.

Mr. Templeton: Your Honor, Mr. Stine has asked this lady every question — asked this question about four different ways. I think I should be entitled to ask it once and see what her answer is.

Mr. Stine: Your Honor —

Mr. Templeton: I'm not asking her about her subjective feelings. I'm asking her an objective question. She can answer yes or no. Mr. Stine got into her thought processes as to whether she would be — would believe a police officer more than anyone else today. I don't think that's relevant, but whether or not she has a relative —

The Court: Yes, that's why we sustained that — You may ask.

Cross-examination Resumed by Mr. Templeton

Q. Miss Huffman, do you have a relative who happens to be a law enforcement officer?

A. Yes, I do.

Q. Do you recall Mr. Walbourn, my co-counsel —

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Do you recall on the morning of February 28, 1983, his asking the questions, do any of you have any relatives or close personal friends, not just an acquaintance, but a close personal friend who happens to be a law enforcement officer, do you recall that?

A. Yes, I recall the question being asked.

Q. And, that question didn't involve whether or not you would believe a law enforcement officer more than anyone else. It was just whether or not you have a relative or close personal friend who was a law enforcement officer?

A. Right.

Q. Do you socialize with your sister and brother-in-law?

A. Occasionally

Mr. Templeton: That's all, your Honor.

The Court: Mr. Hagerman.

Mr. Hagerman: Just one question, your Honor, maybe two. Mr. Templeton and Mr. Stine have been so thorough. They have asked almost everything that I would have asked.

Cross-examination by Mr. Hagerman

Q. Miss Huffman —

The Court: Mr. Hagerman, I'm sure

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you have heard of the phrase, "the ability to blow up an onion sack?"

Mr. Hagerman: Thank you.

Cross-examination Resumed by Mr. Hagerman

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Q. Miss Huffman, did you understand on February 28th, that you had that duty to answer those questions truthfully?

A. I knew when they asked the question, but like I said —

Q. Wait a minute — excuse me for interrupting, but answer my question: did you understand that you had a duty to answer the questions truthfully?

A. Yes, I guess I should have answered them.

Q. Are you saying then that you thought that it was up to you, after a question was asked, it was up to you to determine whether or not that question was important or not?

A. Well, at the time I just didn't realize the importance of the question. I should have answered I guess, and told them about Jim.

Q. Did you realize —

A. But I didn't realize that it was really that important.

Q. Well, the Court never said anything to the effect, "answer these questions truthfully only if you think they are important."

A. No, they didn't say —

Q. No, they didn't say anything like that, did they?

A. No.

Q. So, in effect, and I want to be clear about it, so please correct me if I'm wrong. In effect, what happened was that you did not answer the question truthfully?

A. I did not answer the question at all.

Q. Well, if you were to have answered that question truthfully, you should have stood up and said, "My brother-in-law is a policeman in Portsmouth", corect?

A. No.

Q. You didn't do that, did you?

A. No, I didn't.

Q. And, you did—And, you failed to do that as I understand your testimony, because you, yourself, decided that it was not important, is that correct?

A. That is right, I didn't. It had no bearing — it wouldn't effect me in any way. When everyone began to stand up and tell their reasons why, and then they would say, "Well, if you were chosen to be a juror, would that make any difference whatsoever to you." And, of course, everyone was saying, "no". And, I knew that there was no —I had nothing to hide by not telling it. There was no reason why I shouldn't have told it, but I just didn't. It was just an honest mistake on my part. I will know in the

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future, I will say something.

Q. Well, would you agree with me that although you —if you had stood up and told us about James, and we would have then said, "Well, would the fact that James being your brother-in-law, would that infiuence your decision," and you should have said, "No", and sat down and we would have gone on to somebody else. Would you agree with me though that, if at least, you would have done that we would have known that you had a brother-in-law who was a policeman—

A. —yes, if I had told you, you would have known.

Q. —that you had a brother-in-law who was a policeman, we would have known?

A. Yes.

Mr. Hagerman: That's all. Thank you, Miss Huffman.

The Court: Six—

Mr. Hagerman: Six questions?

Redirect Examination by Mr. Stine

Mr. Stine: I'll see if I can do it in one, your Honor.

Q. Miss Huffman, to clarify a point, did you understand when these questions during Voir Dire were being asked generally, that you were under an obligation to

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answer questions truthfully.

A. In a sense, I would say, "yes", I didn't realize I was compelled—

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Q. Let me ask you this. Do you understand that you were under a duty or had an obligation to answer questions truthfully?

A. Yes.

Q. At the time that you answered this question, did you consider yourself as having answered it untruthfully,

not now, but on the 28th, did you consider yourself to have answered that question untruthfully?

A. No, I didn't.

Mr. Stine: No further questions, your Honor.

Mr. Templeton: Your Honor, at the risk of beating a dead horse to death, I have one question.

The Court: That's mystifying.

Mr. Templeton: Unless I count differently than Mr. Stine. I think his one question expanded.

Recross-examination by Mr. Templeton

Q. Miss Huffman, on February 28th, 1983, did you know that you had a relative that was a law enforcement officer?

A. Yes.

Mr. Templeton: No further questions, your Honor.

The Court: Mr. Hagerman.

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Mr. Hagerman: No questions, your Honor, of this witness.

The Court: You may be excused.

(Witness stands aside.)

The Court: While, we are waiting for the witness, Mr. Deputy Marshal, we'll take a five minute recess, and since Judge Bertelsman is gone, I think we will go down to the big courtroom.

(Recess.)

I, EDWIN J. WALBOURN, III, a member of the Bar of the Supreme Court of the United States, and counsel of record for Petitioner, CHARLES WAYNE SHELTON, hereby certify pursuant to Rule 28.5, Supreme Court Rules, that I served three (3) certified true copies of the within Petition for Writ of Certiorari on behalf of Petitioner, CHARLES WAYNE SHELTON, on the 17th day of May, 1985, by depositing said copies in the United States Post Office, Ashland, Kentucky, with first-class postage prepaid, to the following persons at the following last known addresses thereof, these persons being counsel for all parties represented in the proceedings below:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Respondent,

v.

CHARLES WAYNE SHELTON,

Petitioner.

CERTIFICATE OF SERVICE OF PETITION FOR WRIT OF CERTIORARI BY CHARLES WAYNE SHELTON TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY OF THE ORIGINAL THEREOF

ATTORNEYS FOR Petitioner

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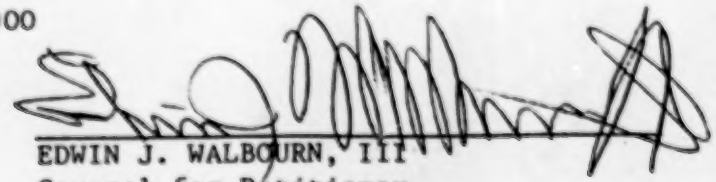

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